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APPENDIX

Supreme Court of the United States

October Term, 1973

No. 73-786

MAJOR FRED R. ROSS and
STATE OF NORTH CAROLINA,

Petitioners

v.

CLAUDE FRANKLIN MOFFITT,

Respondent

MAJOR FRED R. ROSS and
STATE OF NORTH CAROLINA,

Petitioners

v.

CLAUDE F. MOFFITT,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED NOVEMBER 15, 1973.

CERTIORARI GRANTED JANUARY 7, 1974

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* The Opinion of the Fourth Circuit Court of Appeals in MOFFITT v. ROSS, 483 F. 2d 650 (4th Cir. 1973), appears at pp. 12-24 of the printed Petition for Writ of Certiorari filed in this case on November 15, 1973.

Supreme Court of the United States

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v.

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Respondent

RELEVANT DOCKET ENTRIES

I.

No. 72-2480
(Mecklenburg County Conviction)

May 11, 1970 Schedule "B" Criminal Session of the Mecklenburg County Superior Court—Claude Franklin Moffitt, while represented by William D. McNaull, Jr., Esquire, court-appointed counsel, was convicted of forgery and uttering a forged instrument.

November 18, 1970—Opinion of the North Carolina Court of Appeals filed upon Moffitt's appeal, while represented by court-appointed counsel, William D. McNaull, Jr., Esquire,

from the Mecklenburg County Superior Court. STATE v. MOFFITT, 9 N.C. App. 694, 177 S.E. 2d 284 (1970).

December 7, 1970—Moffitt is advised in a letter from his counsel, William D. McNaull, Jr., that he had "approached" the Superior Court for appointment to appeal "from the North Carolina Court of Appeals to the Supreme Court of North Carolina."

December 11, 1970—Moffitt filed an extensive Petition for Post Conviction Review pursuant to N.C.G.S. 15-217, et seq., *Review of Criminal Trials*, in the Mecklenburg County Superior Court contending that the indictment upon which he was tried was invalid.

December 17, 1970—Order filed by the Honorable Frank W. Snepp, Resident Judge of the 26th Judical District, denying post conviction relief.

February 9, 1971—"Petition for Appointment of Counsel" filed in the United States District Court for the Western District of North Carolina — Charlotte Division, was denied.

February 26, 1971—Moffitt filed an Application for Writ of Habeas Corpus. MOFFITT v. ROSS, Civil No. 2842—Charlotte (W.D.N.C.)

September 17, 1971—The Petition for Writ of Habeas Corpus was dismissed.

October 4, 1971—Moffitt gave notice of appeal to the Court of Appeals for the Fourth Circuit.

November 26, 1971—Order filed in the Mecklenburg County Superior Court denying Moffitt's second post conviction petition in which he alleged that his constitutional rights were violated because the North Carolina Court of Appeals,

in accordance with its rules, heard and decided his case upon a narrative of the testimony at the trial instead of the trial transcript itself.

April 17, 1972—The appeal to the Fourth Circuit is dismissed by stipulation so that Moffitt could exhaust State Court remedies.

April 25, 1972—Moffitt filed his third Petition for post conviction review in which he alleged that his statutory and constitutional rights were violated in that the trial court refused to appoint counsel to seek a Petition for Writ of Certiorari on his behalf from the Supreme Court of North Carolina after the North Carolina Court of Appeals had affirmed his conviction.

April 28, 1972—Order filed by the Honorable Frank W. Snepp, Resident Judge of the 26th Judicial District of the State of North Carolina, dismissing Moffitt's third post conviction petition.

May 2, 1972—Order filed by the Honorable Frank W. Snepp, Resident Judge of the 26th Judicial District of North Carolina, appointing Hugh B. Campbell, Jr., Esquire, as court-appointed counsel to represent Moffitt upon Petition for Writ of Certiorari to the North Carolina Court of Appeals.

June 26, 1972—Petition for Writ of Certiorari filed on Moffitt's behalf by Hugh B. Campbell, Jr., Esquire, court-appointed counsel, in the North Carolina Court of Appeals. MOFFITT v. STATE, No. 72SC215PC.

July 18, 1972—Petition for Writ of Certiorari denied by the North Carolina Court of Appeals.

August 25, 1972—Application for Writ of Habeas Corpus filed in the United States District Court for the Western District

of North Carolina — Charlotte Division, MOFFITT v. ROSS, No. C-C-72-193 (W.D.N.C.).

November 29, 1972—Order filed by James B. McMillan, United States District Judge, denying habeas corpus relief on all but one claim.

December 6, 1972—Moffitt gave notice of appeal to the Court of Appeals for the Fourth Circuit.

January 18, 1973—Certificate of Probable Cause entered by John D. Butzner, Jr., Judge of the United States Court of Appeals for the Fourth Circuit.

II.

No. 72-1720
(Guilford County Conviction)

October 30, 1970 Session of the Guilford County Superior Court—Claude Franklin Moffitt while represented by R. D. Douglas, III, Esquire, Public Defender, was convicted in the Guilford County Superior Court.

May 26, 1971—Opinion filed by the North Carolina Court of Appeals in Moffitt's appeal in which he was represented by the Honorable R. D. Douglas, III, Esquire, Public Defender. STATE v. MOFFITT, 11 N. C. App. 337, 181 S.E. 2d 189 (1971).

September 7, 1971—Petition for Writ of Certiorari to the North Carolina Court of Appeals dismissed by the Supreme Court of North Carolina "for lack of a substantial constitutional question." STATE v. MOFFITT, 279 N.C. 396, 183 S.E. 2d 247 (1971).

December 10, 1971—Moffitt filed a paperwriting dated December 8, 1971 in the Guilford County Superior Court, which

he entitled "Motion for Employment of Counsel" "to seek an appeal in the federal courts."

December 14, 1971—Honorable Charles T. Kivett, Resident Judge of the Guilford County Superior Court, advised Moffitt by letter that "this Court does not have jurisdiction to appoint you an attorney to represent you in a further hearing in the federal court. I would advise you to contact the Middle District Court here in Greensboro and ask appointment of counsel through that Court."

January 25, 1972—Moffitt filed a Petition for post conviction review in the Guilford County Superior Court alleging a denial of counsel to perfect an appeal to the Supreme Court of the United States.

February 25, 1972—the Petition for Post Conviction Review was denied by Order filed by the Honorable James G. Exum, Jr., Judge of the Guilford County Superior Court.

March 10, 1972—Petition for Writ of Certiorari filed in the North Carolina Court of Appeals contending that refusal of the Court to appoint counsel denied him "access to the Court of Appeals for the United States."

March 27, 1972—the Petition for Writ of Certiorari was denied in Conference by Order of the North Carolina Court of Appeals.

April 11, 1972—Application for Writ of Habeas Corpus filed in the United States District Court for the Middle District of North Carolina — Greensboro Divison. MOFFITT v. ROSS, No. C-101-G-72 (M.D.N.C.).

May 19, 1972—Memorandum Opinion and Order filed by the Honorable Eugene A. Gordon, Chief United States District Judge for the Middle District of North Carolina, dismissing the Application for Writ of Habeas Corpus.

January 18, 1973—Certificate of Probable Cause entered by John D. Butzner, Jr., Judge of the United States District Court of Appeals for the Fourth Circuit.

III.

CONSOLIDATED PROCEEDINGS

February 6, 1973—Motion to Consolidate No. 72-1720 and 72-2480 filed in the Fourth Circuit Court of Appeals.

February 8, 1973—Motion to Consolidate No. 72-1720 and No. 72-2480 granted.

May 8, 1973—Oral arguments heard in the United States Court of Appeals for the Fourth Circuit.

August 29, 1973—Opinion of the United States Court of Appeals for the Fourth Circuit filed in the consolidated cases of MOFFITT v. ROSS and NORTH CAROLINA, 483 F. 2d 650 (4th Cir. 1973).

September 7, 1973—Notice of Appeal filed by Major Fred R. Ross and the State of North Carolina.

September 11, 1973—Order entered by the United States Court of Appeals for the Fourth Circuit staying the mandate in the consolidated cases of MOFFITT v. ROSS and NORTH CAROLINA.

November 15, 1973—Petition for Writ of Certiorari filed in the Supreme Court of the United States by Major Fred R. Ross and the State of North Carolina in the consolidated cases of ROSS and NORTH CAROLINA v. MOFFITT, No. 73-786, October Term, 1973.

January 7, 1974—Petition for Writ of Certiorari granted in the consolidated cases of ROSS and NORTH CAROLINA v. MOFFITT, No. 73-786, October Term, 1973.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

CLAUDE FRANKLIN MOFFITT,	)	
	)	
Petitioner	)	
	)	
v.	)	C-101-G-72
	)	
MAJOR FRED R. ROSS and	)	
STATE OF NORTH CAROLINA,	)	
	)	
Respondents	)	

MEMORANDUM OPINION AND ORDER

GORDON, Chief Judge

On April 11, 1972, Claude Franklin Moffitt, a state court prisoner, was allowed to file an application for writ of habeas corpus in the Court without the prepayment of fees. 28 U.S.C. § 1915.

The petitioner alleges that his constitutional rights were violated in that:

1. The State of North Carolina has refused to appoint counsel for the purpose of a review of his conviction by the federal courts.

2. He has been denied a trial transcript.

Pursuant to an order to show cause, the respondents filed an answer to the petition and a motion to dismiss. After a consideration of the records before the Court, it is concluded that the petitioner's constitutional rights have not been vio-

lated. Therefore, the relief sought will be denied and the action dismissed.

In state proceedings, the appointment of counsel rests solely in province of the state courts. *Joyner v. Clifton*, No. 71-1619 (4th Cir., April 10, 1972). In federal courts, the appointment of an attorney to represent an indigent is a privilege and not a right, discretionary with the district court. *Bowman v. White*, 388 F. 2d 756 (4th Cir. 1968), *cert. denied*, 393 U.S. 891 (1968).

The petitioner shows no particularized need for a transcript and, therefore, is not entitled to one. *Justice v. Coiner*, No. 15,066 (4th Cir., April 28, 1972).

ORDER

For the reasons set forth above, IT IS ORDERED that the petition of Claude Franklin Moffitt, filed April 11, 1972, be, and the same is hereby denied and dismissed.

In accordance with this Court's liberal policy relative to the filing of actions in forma pauperis, 28 U.S.C. § 1915, and in accordance with the intent of Rule 24, Federal Rules of Appellate Procedure, if the petitioner desires to do so, permission to appeal in forma pauperis is hereby granted. However, because of the many baseless claims this petitioner has submitted to this Court over the years, if an appeal is effected, IT IS ORDERED that all of his files be forwarded pursuant to the Rule cited herein.

IT IS FURTHER ORDERED that the Clerk of this Court mail a certified copy of this Memorandum Opinion and Order to the petitioner at his place of confinement and two certified copies to the Attorney General of the State of North Carolina.

Eugene A. Gordon
United States District Judge

May 19, 1972

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division
C-C-72-193

CLAUDE F. MOFFITT, Petitioner,	)	
	)	
-vs-	)	
	)	ORDER
MAJOR FRED R. ROSS and	)	
STATE OF NORTH CAROLINA,	)	
	)	
Respondents.	)	

Petitioner, Claude Franklin Moffitt, is presently detained at the North Carolina prison unit in Statesville serving consecutive sentences of eight (8) to ten (10) years for forgery and eight (8) to ten (10) years for uttering a forged check imposed on May 20, 1970, in Mecklenburg County Superior Court by Judge T. D. Bryson upon petitioner's conviction by a jury. Moffitt appealed his conviction to the North Carolina Court of Appeals, which found "(no) error." *State* v. *Moffitt*, 9 N.C. App. 694, 177 S.E. 2d 324 (1970). He then sought habeas corpus relief in this court by petition filed on February 17, 1971. In an order filed September 17, 1971, the petition was dismissed and all claims were denied. On October 4, 1971, Moffitt gave notice of appeal to the Court of Appeals for the Fourth Circuit.

Subsequently, in a letter dated November 15, 1971, Moffitt, in essence, asked this court to reconsider its ruling on one of the allegations treated in the order of September 17, 1971. On April 20, 1972, it was ordered by the court, treating petitioner's letter as a motion to reconsider judgment and to grant a certificate of probable cause, that the the motion be denied.

Meanwhile, by stipulation of counsel filed with the Fourth

Circuit Clerk of Court April 19, 1972, the case on appeal to the Fourth Circuit was dismissed without prejudice, apparently in order for Moffitt to utilize or exhaust state remedies on one of the issues raised. Accordingly, he filed for post-conviction relief in Mecklenburg County Superior Court, which relief was denied by Judge Frank W. Snepp in an order dated April 28, 1972. Appointed counsel for Moffitt petitioned for writ of certiorari from the North Carolina Court of Appeals on June 26, 1972, for review of Judge Snepp's order. The petition was denied by order of the court in conference dated July 17, 1972.

Moffitt again seeks a writ of habeas corpus from this court, alleging the following as grounds for relief:

(1) That he was denied the effective assistance of counsel for trial and appeal;

(2) That he was subjected to an unconstitutional penalty for pleading not guilty in that he was told if he would plead guilty he would receive a far lesser sentence;

(3) That his punishment was excessive because his pretrial time was not credited to the sentence;

(4) That he was denied a fair trial;

(5) That the trial court was without jurisdiction by reason of "defective and multiplied" bills of indictment; and

(6) That the state failed to appoint him counsel to file a petition for certiorari in the North Carolina Supreme Court.

The first three grounds are new to this court; the last three appeared, in one fashion or another, in Moffitt's previous petition.

ALLEGATION ONE: In support of the allegation of in-

effective counsel, Moffitt merely states that his attorney misled him in his appeal rights. This issue has not been developed in any of the state court proceedings in Moffitt's case. State remedies must be exhausted before this court can consider the issue of ineffective counsel. 28 U.S.C. § 2254(b) (1971). See, e.g., *Duffield* v. *Peyton*, 352 F.2d 802 (4th Cir. 1965).

ALLEGATION TWO: Moffitt pleads no facts in support of his claim that he was told that if he would plead guilty he would receive a far lesser sentence. However, in the state court post-conviction proceedings it was determined, and alleged on appeal by Moffitt's appointed counsel, that Moffitt's trial attorney was the only person who might have so advised him. In essence, Moffitt hints at an offered plea bargain. The plea bargain has been approved by the Supreme Court and the Fourth Circuit, with appropriate safeguards. *Santobello* v. *New York*, 404 U.S. 257 (1971); *Walters* v. *Harris*, 460 F.2d 988 (4th Cir. 1972). It is axiomatic that when the offered bargain is refused, defendant runs the risk of receiving a harsher sentence than the one proposed in the plea bargain. Moreover, it does not appear that Moffitt's individual right to a jury trial was penalized or "chilled" by any proposed bargain, since Moffitt did indeed plead not guilty and receive the benefits of trial by jury. Admittedly, due process forbids vindictiveness on the part of the state against a defendant who seeks a trial that comports with the Constitution. See *North Carolina* v. *Pearce*, 395 U.S. 711 (1969); *Colten* v. *Kentucky*, 407 U.S. 104 (1972). Yet petitioner's vague allegations do not point towards vindictiveness on the part of the state. Instead they point to the realistic appraisal of the situation by Moffitt's trial lawyer—that if the defendant pleaded guilty and thus facilitated the task of the prosecutor, he might benefit from a recommendation of a more lenient sentence. This is the very essence of the plea bargain.

ALLEGATION THREE: As with his first allegation, Moffitt has not presented to the state courts his request for credit

against his sentence of his pre-trial jail time. However, this court does not require the exhaustion of state remedies with respect to a claim for pre-trial custody, since the possibility of relief in the state courts on this grounds in foreclosed. See *State* v. *Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970) and *Perry* v. *Blackledge*, 453 F. 2d 856 (4th Cir. 1971). [North Carolina General Statutes § 15-176.2, allowing credit for pre-trial custody, did not become effective until July 19, 1971, and is not retroactive.]

In its supplemental answer to this petition the state admits that Moffitt spent fully six months (November 19, 1969 to May 20, 1970) in jail awaiting trial. This court has repeatedly held that confinement without credit for time spent in jail before trial unable to make bail violates the equal protection clause of the Fourteenth Amendent. *E.g.*, *Steele* v. *North Carolina*, No. C-C-72-37 (W.D. N.C. 1972).

Unless the state can affirmatively show that credit for pre-trial custody was given or that pre-trial incarceration was considered by the trial judge in sentencing, it appears that Moffitt's request for credit should be granted.

ALLEGATION FOUR: Moffitt alleges that he was denied a fair trial. In the immediate petition he alleges no supporting facts. His previous petition alleged erroneous admission of prejudicial testimony and improper jury instructions. In general, defects in trial procedure are cognizable in federal habeas corpus only when they impugn the fundamental fairness of criminal proceedings. *Grundler* v. *North Carolina*, 283 F.2d 798 (4th Cir. 1960). As before, Moffitt has failed to meet the burden of demonstrating fundamental unfairness.

ALLEGATION FIVE: Again Moffitt alleges multiple and defective indictments as grounds for relief. After thorough consideration this court previously determined his complaints to be devoid of constitutional merit. Nothing has changed.

ALLEGATION SIX: Moffitt asserts a statutory and constitutional right to counsel for the filing of a petition for certiorari in the North Carolina Supreme Court. In its orders of September 17, 1971, and April 20, 1972, this court held essentially that both statutory and constitutional law grant the right to counsel only on direct as opposed to discretionary review and that since the writ of certiorari in the North Carolina Supreme Court is a form of discretionary review, the right to counsel does not accrue.

Although the right of the indigent to counsel throughout the entire criminal process is still developing, see, *e.g. Argersinger* v. *Hamlin*, 407 U.S. 25 (1972) (especially the remarks of Chief Justice Burger in concurrence), this court at this time chooses to stand by its earlier orders and to continue to hold that the constitutional right to counsel does not accrue at the stage of the North Carolina criminal process in which application for writ of certiorari in the North Carolina Supreme Court is made, after a full and fair trial and a complete review for error by the North Carolina Court of Appeals.

When this court's earlier orders were appealed to the Court of Appeals for the Fourth Circuit both counsel for the state and the appointed counsel for Moffitt realized that this court's orders might have been premature, since Moffitt had not exhausted state remedies on the point of right to counsel. They therefore entered into a stipulation of dismissal without prejudice in order for Moffitt to seek redress in the state courts. A key phrase in the stipulation is now alleged by Moffitt to be dispositive of the very issue that had been on appeal.

The phrase was cited as controlling the outcome of the case when it was taken back into the North Carolina courts system for post-conviction relief. The same lawyer that signed the stipulation on behalf of the state at the Fourth Circuit level asserted before the North Carolina Court of Appeals that the

term in question "was intended only to illustrate that the State of North Carolina, by legislation, had adopted an omnibus statutory scheme providing for the appointment of counsel in enumerated instances deemed to be critical stages of criminal prosecution and was never intended to be a concession of the ultimate issue which was to be the subject of subseqent judicial review to be commenced in the courts of the State of North Carolina." This court is compelled to agree with this interpretation, despite the ill-phrased language of the term, simply because the actions of the state are perfectly consistent with such intent and because it is most difficult to believe that the state's advocate (known by this court to be capable) would concede the ultimate issue when, thrice or more, courts had ruled in his favor on the same point.

Accordingly, IT IS ORDERED, that within twenty (20) days after the filing of this order the state affirmatively show whether credit was given for petitioner's pre-trial custody by the trial judge or that such custody was considered by the trial judge in sentencing. If no such evidence exists the state is directed to credit the petitioner's sentence with time spent in custody pending trial (November 19, 1969, to May 20, 1970).

Otherwise, IT IS ORDERED, that all claims for relief be, and they are hereby denied.

The petitioner is advised that he may appeal *in forma pauperis* from this *final order* by forwarding a written notice of appeal to the Clerk of the United States District Court, Post Office Box 1266, Charlotte, North Carolina 28201. Said *written* notice of appeal must be *received* by the Clerk within thirty (30) days from the date of this order and may be filed without the prepayment of costs or giving of security therefor. The court declines to issue a certificate of probable cause.

The Clerk is directed to transmit by mail copies of this order

to the petitioner; to the Attorney General of North Carolina; and to the superintendent or officer in charge of the institution at which the petitioner is presently confined.

This 28 day of November, 1972.

James B. McMillan
United States District Judge

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APPENDIX

TABLE OF CASES

STATUTES INVOLVED

In The

Supreme Court of the United States

October Term, 1973

No.

MAJOR FRED R. ROSS and
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Petitioners

v.

CLAUDE FRANKLIN MOFFITT,

Respondent

MAJOR FRED R. ROSS and
STATE OF NORTH CAROLINA,

Petitioners

v.

CLAUDE F. MOFFITT,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, Major Fred R. Ross and the State of North Carolina, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals filed August

29, 1973, in the consolidated cases of MOFFITT v. ROSS and MOFFITT v. ROSS.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit filed August 29, 1973 is not yet reported and is printed as Appendix A to this Petition (A pp 12-24).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

WHETHER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE THE APPOINTMENT OF COUNSEL TO REPRESENT AN INDIGENT DEFENDANT SEEKING DISCRETIONARY REVIEW OF CONVICTIONS AFFIRMED ON APPEALS WHICH WERE TAKEN AS OF RIGHT.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE
(No. 72-1720)

(Guilford County Conviction)

In 1970, in the Guilford County (North Carolina) Superior Court, Claude Franklin Moffitt, while represented by R. D. Douglas, III, Esquire, Assistant Public Defender of the Eighteenth Judicial District of the State of North Carolina[1],

1. N.C.G.S. 7A-451 reads in relevant part:
"(a) An indigent person is entitled to services of counsel on the following actions and proceedings:
"(1) Any felony case . . ."
• • •
See, also, Article 37 of Chapter 7A of the General Statutes of North Carolina, N.C.G.S. 7A-465, et seq., *The Public Defender*.

was tried and convicted of forgery and uttering a forged instrument.

On appeal as of right to the North Carolina Court of Appeals[2], while still represented by Assistant Public Defender Douglas, the conviction was affirmed, STATE v. MOFFITT, 11 N.C. App. 337, 181 S.E. 2d 184 (1971), and the Supreme Court of North Carolina denied a Petition for Writ of Certiorari filed on Moffitt's behalf by the Public Defender.[3] STATE v. MOFFITT, 279 N.C. 396, 183 S.E. 2d 247 (1971).

On December 10, 1971, Moffitt filed a paperwriting dated December 8, 1971, which he entitled "MOTION FOR EMPLOYMENT OF COUNSEL" "to seek an appeal in the Federal Courts."[4] On January 25, 1972, Moffitt filed a petition for post conviction review alleging the denial of counsel to perfect an appeal to the Supreme Court of the United States. This Petition was denied by Order filed February 25, 1972. After denial of the Petition, Moffitt then filed a Petition for Writ of Certiorari in the North Carolina Court of Appeals on March

2. N.C.G.S. 7A-27 reads in relevant part:
"Appeals of right from the courts of the trial divisions.—

"(b) From any final judgment of a superior court, other than one described in subsection (a) of this section, or one entered in a post-conviction hearing under Article 22 of Chapter 15, including any final judgment entered upon review of a decision of an administrative agency, *appeal lies of right to the Court of Appeals.*" (Emphasis added.)

3. N.C.G.S. 7A-30 reads in relevant part:
"Appeals of right from certain decisions of the Court of Appeals.—Except as provided in § 7A-28, from any decision of the Court of Appeals rendered in a case

"(1) Which directly involves a substantial question arising under the Constitution of the United States or of this State, or
"(2) In which there is a dissent . . ."

• • •

In STATE v. MOFFITT, 279 N.C. 396, 183 S.E. 2d 247 (1971), the Supreme Court of North Carolina dismissed the appeal "for lack of a substantial constitutional question."

4. By letter dated December 14, 1971, the Honorable Charles T. Kivett, Resident Judge of the Guilford County Superior Court, advised Moffitt that "this Court does not have jurisdiction to appoint you an attorney to represent you in a further hearing in the federal court. I would advise you to contact the Middle District Court here in Greensboro and ask appointment of counsel through that court."

10, 1972 in which he contended that the refusal of the Court to appoint counsel denied him "access to the Court of Appeals for the United States." This Petition for Writ of Certiorari was denied by the North Carolina Court of Appeals in Conference on March 27, 1972. Moffitt then filed an application for federal habeas corpus on April 11, 1972, which was denied on May 19, 1972. MOFFITT v. ROSS, No. C-101-G-72 (M.D.N.C., May 19, 1972). Upon Moffitt's appeal to the United States Court of Appeals for the Fourth Circuit, it was held that he has a ". . . right to assistance of counsel in seeking access to the Supreme Court of the United States . . .", and directed the District Court upon remand, to ". . . appraise the substantiality of the federal claim . . ." in circumstances ". . . where the only remedy available to the District Court would be the prisoner's release on a Writ of Habeas Corpus . . . ."

STATEMENT OF THE CASE

(No. 72-2480)

(Mecklenburg County Conviction)

At the May 11, 1970 Schedule "B" Criminal Session of the Mecklenburg County (North Carolina) Superior Court, Moffitt, while represented by William D. McNaull, Jr., Esquire, court-appointed counsel, was convicted of forgery and uttering a forged instrument. On appeal to the North Carolina Court of Appeals[5], while still represented by William D. McNaull, Jr., Esquire, Moffitt's conviction was affirmed on November 18, 1970. STATE v. MOFFITT, 9 N.C. App. 694, 177 S.E. 2d 284 (1970). Mr. McNaull then "approached" the Superior Court for appointment to appeal "from the North Carolina Court of Appeals to the Supreme Court of North Carolina." In his letter to Moffitt, Mr. McNaull suggested that Moffitt

> ". . . immediately proceed with filing your petitions for habeas corpus in the Federal Court. You might also file one in the Mecklenburg Superior Court alleging that the

5. See N. 2, supra.

State must appoint a lawyer for you to take your appeal from the Court of Appeals to the Supreme Court.

"I would ordinarily be happy to prepare these petitions for writs for you, however, I will await hearing from you . . ."

On December 11, 1970, Moffitt filed an extensive petition for post conviction review pursuant to N.C.G.S. 15-217, et seq., *Review of Criminal Trials*, in the Mecklenburg County Superior Court contending that the indictment on which he was tried was invalid. This Petition was denied by Order filed December 17, 1970. Moffitt then filed a "PETITION FOR APPOINTMENT OF COUNSEL" in the United States District Court which was denied by Order dated February 9, 1971. On February 26, 1971, Moffitt then filed an Application for Writ of Habeas Corpus. MOFFITT v. ROSS, Civil No. 2842—Charlotte (W.D.N.C.). By Order filed September 17, 1971, habeas relief was denied and Moffitt appealed. By stipulation the appeal to the Fourth Circuit Court of Appeals was dismissed so that Moffitt could exhaust State Court remedies. On April 25, 1972, Moffitt filed his third petition for post conviction review. In the first he alleged that the Bill of Indictment upon which he was tried was fatally defective, a contention which he had unsuccessfully urged upon his appeal to the North Carolina Court of Appeals. In the second, which was denied by Order of the Mecklenburg County Superior Court on November 26, 1971, he alleged that his constitutional rights were violated because the North Carolina Court of Appeals, in accordance with its rules, heard and decided his case upon a narrative of the testimony at the trial instead of the trial transcript itself.[6] In the third petition filed April 25, 1972, he alleged that his statutory and constitutional rights were violated in that the trial court refused to appoint counsel to seek a Petition for Writ of Certiorari on his behalf from the Supreme Court of North Carolina after the North Carolina

6. Rule 19(d), Court of Appeals Rules.

Court of Appeals had affirmed his conviction. By Order dated April 28, 1972, the Petition filed April 25, 1972 was denied. Moffitt sought certiorari from the North Carolina Court of Appeals to review the Order of April 28, 1972, and by Order dated May 2, 1972, Hugh B. Campbell, Jr., Esquire, was court-appointed to represent Moffitt in seeking certiorari from the North Carolina Court of Appeals.[7] On June 26, 1972, Moffitt's counsel filed a Petition for Writ of Certiorari which was denied by the North Carolina Court of Appeals. MOFFITT v. STATE, No. 72SC215PC. On August 25, 1972, Moffitt once again filed an Application for Writ of Habeas Corpus which was denied by Order of the District Court on November 29, 1972. MOFFITT v. ROSS, Civil No. C-C-72-193 (W.D.N.C.). From the denial of all but one claim by the District Court, Moffitt appealed to the Fourth Circuit Court of Appeals which held that ". . . The same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals."

REASONS FOR GRANTING THE WRIT

(1)

THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN THE CASES OF MOFFITT v. ROSS CONFLICTS WITH THE DECISION OF THIS COURT IN DOUGLAS v. CALIFORNIA, 372 U.S. 353 (1963), WITH THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IN PENNINGTON

7. N.C.G.S. 7A-451 reads in pertinent part:
"(a) An indigent person is entitled to services of counsel in the following actions and proceedings:

"(3) A post conviction proceeding under Chapter 15 of the General Statutes."

• • •

N.C.G.S. 15-222 reads in relevant part:

"Review by application for certiorari.—Any final judgment entered upon such a petition and proceeding may be reviewed by the Court of Appeals of North Carolina upon application by the petitioner or by the State for writ of certiorari brought within 60 days from the entry of the judgment in such proceeding."

v. PATE, 409 F. 2d 757 (7th Cir. 1969), AND WITH THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS IN PETERS v. COX, 341 F. 2d 575 (10th Cir. 1965).

In reliance upon principles which it found in DOUGLAS v. CALIFORNIA, supra, ". . . to require the result we reach . . .," the Fourth Circuit Court of Appeals has extended the constitutional right to counsel beyond the appeal of right, to ". . . require counsel in other and subsequent discretionary appeals," both from the court to which an appeal is taken as of right to the highest court in a multi-tiered appellate system state—and from the highest state court to this Court. The decision of the Fourth Circuit Court of Appeals in the MOFFITT cases goes well beyond this Court's decision in DOUGLAS v. CALIFORNIA, supra. In DOUGLAS this Court only went so far as to say that an indigent defendant is entitled to counsel where an appeal in a criminal case is a matter of right. As Mr. Justice Douglas stated in delivering the opinion of the Court:

> "We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. *We are dealing only with the first appeal, granted as a matter of right to rich and poor alike . . . from a criminal conviction.* We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeals had sustained his conviction . . . or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by appeal as of right or by petition for writ of certiorari which lies within the Court's discretion. But it is appropriate to observe

> that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination.' . . . Absolute equality is not required; lines can be and are drawn and we often sustain them . . . But where the merits of *the one and only appeal* an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." (Emphasis added.) DOUGLAS v. CALIFORNIA, supra, at 356, 357.

In PETERS v. COX, supra, the Tenth Circuit Court of Appeals was confronted with a similar proposition, i.e., that the Supreme Court of New Mexico had denied Peters' constitutional rights by refusing and failing to appoint counsel to assist him in taking an appeal in a criminal case from the Supreme Court of New Mexico to this Court. In PETERS, a per curiam decision, the Court stated:

> "It is, of course, the law that the due process clause of the Fourteenth Amendment to the Constitution requires the appointment of counsel to represent an indigent defendant in a state criminal trial . . . It is also the law that under the due process and equal protection clauses of the Fourteenth Amendment, an indigent defendant has the right to appointed counsel on appeal of a state criminal conviction . . . But, we have been cited to no authority requiring, or even permitting, a state supreme court to appoint counsel for an indigent defendant to represent him on his appeal to the Supreme Court of the United States. Our own research has revealed none . . . ."

In PENNINGTON v. PATE, 409 F. 2d 757 (7th Cir. 1969), cert. denied, 396 U.S. 1042 (1969), the Seventh Circuit Court of Appeals was also presented with this contention. In denying relief, the Court noted that, ". . . If we were to hold for the petitioner here, we would be saying a fortiori that the Supreme Court's present practice of not granting counsel for the purpose

of preparing certiorari petitions is contrary to equal protection under the Constitution. This we are unwilling to do." PENNINGTON v. PATE, supra, at 760.

While acknowledging that "Two Courts of Appeals have held that the questions reserved in DOUGLAS should be answered in the negative . . .", the Fourth Circuit ". . . notice[d] the possible impact of changing times . . ." and concluded that ". . . As our legal resources grow, there is a correlative growth in our ability to implement basic notions of fairness . . . ." Therefore, the Fourth Circuit Court of Appeals read in DOUGLAS, which now requires counsel in the first appeal of right, to also ". . . require counsel in other and subsequent discretionary appeals."

These conflicts justify the grant of certiorari to review the judgment below.

(2)

THE DECISION BELOW RAISES SERIOUS PROBLEMS AFFECTING THE STRUCTURE OF CRIMINAL JUSTICE.

The decision below should be reviewed because it erroneously interprets this Court's opinion in DOUGLAS v. CALIFORNIA, supra, ". . . to require the result we reach . . ." and the Circuit Court's finding that ". . . the only remedy available to the District Court would be the Petitioner's release on a writ of habeas corpus . . ."

Moffitt has been provided with court-appointed counsel at every stage of the proceeding at which counsel is constitutionally required under either GIDEON v. WAINWRIGHT, 372 U.S. 335 (1936) or DOUGLAS v. CALIFORNIA, supra. The decision of the Fourth Circuit Court of Appeals in these cases establishes a constitutional right to court-appointed counsel for indigent defendants in situations in which this Court, and all other courts considering the issue, have found no such right to exist. In these cases MOFFITT was provided with counsel

at every stage of the proceeding at which the developed case law required the appointment of counsel. We are now confronted with a landmark holding going beyond the requirement of counsel for critical stages or the appeal as of right, to the level of discretionary review applicable to multi-tier appellate systems, in which the second review is discretionary and sought by Petition by Writ of Certiorari. Going beyond the second tier in a multi-tier jurisdiction, or beyond the appeal as of right in a single-tier system, the Fourth Circuit Court of Appeals has announced a new constitutional principle, i.e., the constitutional right to counsel of an indigent defendant seeking discretionary review from this Court by Writ of Certiorari from the highest court of a state, or by analogy, from a federal conviction upheld by a Circuit Court. And, according to the Fourth Circuit, if counsel has not been appointed to seek the discretionary review, the indigent defendant's rights have been violated and he is entitled to a writ of habeas corpus. The impact of this decision is obvious upon both state and federal court convictions, since this Court has never suggested a holding as sweeping in its total scope as the Fourth Circuit's holding in this case—in fact, all opinions of this Court and of the Circuits support a conclusion contrary to that reached by the Fourth Circuit.

CONCLUSION

The decision of the Fourth Circuit in the application of the DOUGLAS doctrine in this case extends well beyond the intent of this Court. It is clear that this Court's holding in DOUGLAS did not envision the conclusion reached in the case at bar. The right to counsel to seek discretionary review is not the situation to which the holding in DOUGLAS applies. Therefore, in view of the conflict of decisions between the Tenth and Seventh Circuits, the decision of this Court in DOUGLAS, and the effect upon the administration of justice, both state and federal, it is respectfully submitted that this case is of sufficient importance that this Court exercise its jurisdiction

and issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit. We believe that the questions submitted are truly substantial and present to this Court far reaching issues of the most vital public importance that must be answered.

Respectfully submitted,

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COUNSEL FOR PETITIONERS

United States Court of Appeals

FOR THE FOURTH CIRCUIT

Claude Franklin Moffitt,

Appellant,

versus

Major Fred R. Ross and
State of North Carolina,

Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, District Judge.

No. 72-2480

Claude F. Moffitt,

Appellant,

versus

Major Fred R. Ross and
State of North Carolina,

Appellees.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

Argued May 8, 1973. Decided August 29, 1973

Before Haynsworth, Chief Judge and Craven and Butzner, Circuit Judges.

Thomas B. Anderson, Jr., [Court-appointed counsel] (Loflin, Anderson, Loflin and Goldsmith on brief) for Appellant in Nos. 72-1720 and 72-2480; Jacob L. Safron, Assistant Attorney General of North Carolina, (Robert Morgan, Attorney Gen-

eral of North Carolina, Richard N. League, Assistant Attorney General of North Carolina, on brief) for Appellees in Nos. 72-1720 and 72-2480.

HAYNSWORTH, CHIEF JUDGE:

We are met with the questions reserved by the Court in *Douglas v. California*, 372 U.S. 353.

In *Douglas*, the Supreme Court held that an indigent, convicted of a felony, was entitled to the assistance of assigned counsel in presenting his appeal to the state's intermediate appellate court. It reserved the question of entitlement to assigned counsel in subsequent permissive review proceedings and limited its holding to counsel in "*the one and only appeal* an indigent has as of right" [emphasis in original]. These cases present the questions whether, after affirmance of a felony conviction by a state's intermediate appellate court, an indigent defendant is entitled to the assistance of assigned counsel in seeking further permissive review (1) in the state's highest court, and (2) in the Supreme Court of the United States. We conclude that he is, for, in this context, we find no basis for differentiation between appeals as of right and permissive appeals or between first appeals and second or third stage review.

No. 72-2480

The first of Moffitt's two convictions of forgery and uttering forged instruments was had in Mecklenburg County, North Carolina. With the assistance of appointed counsel, he took an appeal to the North Carolina Court of Appeals, which affirmed the conviction. *North Carolina v. Moffitt*, 9 N.C. App. 694, 177 S.E.2d 324. His lawyer then informed Moffitt that the court would not appoint him to prepare and file a petition for a writ of certiorari in the North Carolina Supreme Court. In his letter to Moffitt, he stated that he had sought such an appointment from the Superior Court, but that it had been refused on the ground that assignment of counsel was not re-

quired to handle an application to the North Carolina Supreme Court for permissive review.

Moffitt alleges he then sought to prepare and file such an application himself, but it was denied because of tardiness.

After an aborted federal petition, Moffitt exhausted his state postconviction remedies and then sought a writ of habeas corpus in the District Court for the Western District of North Carolina on the ground, among others, that refusal to provide assigned counsel to prepare and file an application for a writ of certiorari in the North Carolina Supreme Court was a denial of a federal constitutional right to counsel.

No. 72-1720

Moffitt's second conviction was in Guilford County, North Carolina, where he was represented by a lawyer in the office of the Greensboro Public Defender. With the assistance of that lawyer, he took an appeal to the North Carolina Court of Appeals, which affirmed the conviction. *North Carolina v. Moffitt*, 11 N.C. App. 337, 181 S.E.2d 184. In this case the Public Defender was authorized to prepare and file an application for a writ of certiorari in the Supreme Court of North Carolina. He did so, and the Attorney General countered with a motion to dismiss on the ground that no substantial constitutional question was presented. The motion was granted on that ground. *North Carolina v. Moffitt*, 279 N.C. 396, 183 S.E.2d 247.

Moffitt unsuccessfully petitioned the Superior Court and the North Carolina Court of Appeals for the provision of legal assistance in preparing and filing a writ of certiorari in the Supreme Court of the United States. Denied that assistance, he then sought habeas relief in the District Court for the Middle District of North Carolina. Denied relief there, his appeal presents the question of his constitutional right to the assistance of counsel in seeking a writ of certiorari from the

Supreme Court of the United States to the Supreme Court of North Carolina.

I

In North Carolina, there is an appeal as of right from the Superior Court to the North Carolina Supreme Court in criminal cases, if the sentence is death or life imprisonment. N.C.G.S. § 7A-27 (a). In all other criminal cases such as these, there is an appeal as of right from the Superior Court to the North Carolina Court of Appeals. N.C.G.S. § 7A-27 (b). There is an appeal of right from the Court of Appeals to the Supreme Court of North Carolina only if the case involves a substantial question arising under the Constitution of the United States or under the Constitution of North Carolina, and in other cases if one of the judges of the Court of Appeals has dissented. N.C.G.S. § 7A-30. In all other cases, such as these, there is only a discretionary right of review by the Supreme Court of North Carolina of judgments of the North Carolina Court of Appeals. N.C.G.S. § 7A-31.

By statute, North Carolina has provided for the assignment of a lawyer to represent an indigent on "[d]irect review of any judgment or decree, including review by the United States Supreme Court of final judgments or decrees rendered by the highest court of North Carolina in which decision may be had." N.C.G.S. § 7A-451 (b) (6).

To us, the reasonable interpretation of that statute would provide a statutory right of counsel to Moffitt in each instance in which it was denied. We would read "direct review" of a criminal conviction as including permissive review proceedings in the North Carolina Supreme Court and in the Supreme Court of the United States, but North Carolina, seemingly, and her Attorney General, expressly, interprets the statute as excluding not only collateral civil proceedings but permissive appellate procedures in direct review as well. As construed by the state, "direct review" includes only such appellate pro-

cedures as may be taken as a matter of right. Under the state's construction, the statutory obligation was fully performed when Moffitt was provided with legal assistance in taking his two appeals to the North Carolina Court of Appeals.

In our habeas jurisdiction, we review only federal constitutional questions. We have no jurisdiction to enforce state statutory rights. For the purposes of these appeals, therefore, we need not pause to determine whether the Attorney General's assertion about the prevailing state construction of the statute is authoritatively supported. Ultimately, of course, whatever our inclination, the authoritative construction of the North Carolina statute would be for the North Carolina courts, but since in this case we have no jurisdiction to enforce statutory rights, we simply lay aside the statute upon the Attorney General's assertion of the prevailing construction in practice without further inquiry as to whether that practice has the authoritative sanction of North Carolina's appellate courts.

Against the background of the statute, however, it is relevant to note that, despite the state's claim that it is not required to provide counsel for permissive appellate procedures, it does so with great frequency. This fact was established by the Assistant Director of North Carolina's Administrative Office of the Courts. It was admitted by counsel for North Carolina during oral argument of these cases. In the Guilford County case, Moffitt, himself, was provided with legal assistance by North Carolina as he sought certiorari in the North Carolina Supreme Court. Counsel for North Carolina could suggest no reason why legal assistance was provided Moffitt in seeking certiorari in the North Carolina Supreme Court in the one case, but not in the other. Inquiry was made of the Assistant Attorney General as to the existence of any guidelines to be followed by state judges in deciding whether or not assigned counsel should be provided to assist indigents in seeking permissive review. He responded that he knew of none.

This record provides an insufficient basis for a finding or a

conclusion that North Carolina's administration of her statute works a denial of equal protection of the laws to some indigent appellants. It may not be amiss, however, to note that such a problem may be lurking in this case, for, if judges of courts whose judgments are sought to be reviewed are deciding whether or not to assign counsel to prepare and file an application for permissive review, and there are no standards or guidelines to govern their determination, it may well be that some indigents are denied the assistance of counsel in situations entirely comparable to those in which other indigents are furnished the assistance of counsel.

II

At the outset we have observed that the Supreme Court in *Douglas v. California* confined its holding that an indigent had a constitutional right to the assistance of counsel in appellate procedures to appeals which were taken by right. It disclaimed consideration of subsequent permissive appellate procedures. Indeed, no such question was presented in *Douglas*, and it was natural for the Court to limit its holding to the particular question before it.

On principle, however, we can find no logical basis for differentiation between appeals of right and permissive review procedures in the context of the Constitution and the right to counsel.

Discretionary and permissive procedures by which a high appellate court is given the means of control of its own docket have largely been born of necessity in order to permit the highest appellate court to perform its primary and important functions. The certiorari practice in the Supreme Court sprang from such a need. When intermediate courts of appeals have been set up in the more populous states, they have come to relieve the state's highest court of a recognized overburden. The underlying purpose would be thwarted if every losing litigant in the intermediate appellate court had an unconditional right of appeal to the state's highest court. The purpose can

be accomplished only if, within statutory limitations, the state's highest court is given the right of selectively choosing to hear only those cases which seem to it to come within its primary purposes and functions.

A conversion by a state from a single tier appellate system to a double tier system, however, does not alter the fact that the state's highest court remains the ultimate arbiter of the rights of its citizens. While the right to appeal to such a court may be qualified and subject to that court's grant of a preliminary petition, the right to apply for such a review may be of great importance to the litigant. Indeed, in the context of constitutional questions arising in criminal prosecutions, permissive review in the state's highest court may be predictably the most meaningful review the conviction will receive.

If, as *Douglas* holds, deprivation of counsel to an indigent appellant seeking to appeal a felony conviction to an intermediate court of appeals so dilutes the quality of justice that it amounts to a deprivation of due process or equal protection, denial of counsel as he seeks access to the state's highest court would seem a similar and comparable deprivation. A defendant with adequate resources to engage counsel has a meaningful right to seek access to the state's highest court. An indigent should be afforded counsel to give him a comparably meaningful right. Deprived of it, it is of little comfort to him that he was afforded legal guidance in an appeal to a subordinate court. Denied the assistance of a competent lawyer, the quality of justice for the indigent has been substantially impaired in comparison with the quality of justice afforded his more affluent brothers.

An indigent defendant is as much in need of the assistance of a lawyer in preparing and filing a petition for certiorari as he is in the handling of an appeal as of right. In many appeals, an articulate defendant could file an effective brief by telling his story in simple language without legalisms, but the technical requirements for application for writs of certiorari are

hazards which one untrained in the law could hardly be expected to negotiate.

> Certiorari proceedings constitute a highly specialized aspect of appellate work. The factors which [a court] deems important in connection with deciding whether to grant certiorari are certainly not within the normal knowledge of an indigent appellant. Boskey, *The Right to Counsel in Appellate Proceedings*, 45 *Minn. L. Rev.* 783, 797 (1961) (footnote omitted).

It is not only in multi-tiered appellate systems that a state's highest court is given discretionary control of its docket. In Virginia, for instance, review of felony convictions in the Virginia Supreme Court is by a writ of error to the trial Court. Code of Virginia § 19.1-282. Under the Virginia practice, a convicted criminal defendant may file with the Virginia Supreme Court a petition for a writ of error. As petitions for writs of certiorari to other courts, that court may grant or deny the petition. The cases are not fully briefed or argued, unless the petition for a writ of error is first granted, for the writ is the means by which the case is brought into the Supreme Court of Virginia.[1]

Though Virginia's appellate procedures for the review of felony convictions are equally as permissive as is the review by the Supreme Court of North Carolina of decisions of the North Carolina Court of Appeals, it seems clear to us that a Virginia defendant is as much in need of counsel in seeking access to the Supreme Court of Virginia as is a defendant in another state in which the first and only appeal is one of right.

1. By court rule, the Virginia Supreme Court allows limited argument on a petition for a writ of error by the appellant, but not by the appellee. This hearing is before a single Justice, Rules 5:24 and 5:28, or before a panel of three Justices, upon which retired Justices may serve, and frequently do.

   In the opinions of the Virginia Supreme Court in criminal cases, there is usually a routine recital of the grant of a writ of error. *See, e.g.*, Delawder v. Virginia, -- Va. --, 196 S.E.2d 913; Hewitt v. Virginia, 213 Va. 605, 194 S.E.2d 893; Howell v. Virginia, 213 Va. 590, 194 S.E.2d 758; Huff v. Virginia, 213 Va. 710, 194 S.E.2d 690.

The Virginia Supreme Court does take a substantial number of criminal cases. It takes enough to keep Virginia law current, and quick glances through the books indicate reversals in a substantial number of the cases it takes.

The Virginia Supreme Court itself, has held that an indigent criminal defendant has a constitutional right to the assistance of assigned counsel as he seeks access to that court. *Cabaniss v. Cunningham*, 206 Va. 330, 143 S.E.2d 911. We agree that, in an appellate system like Virginia's, the Constitution mandates the assignment of counsel for the assistance of indigents no less than in another state in which the appellate court has no discretionary means of controlling its docket.

For such reasons, we conclude that the differences between appeals as of right and discretionary appeals do not warrant differentiation in constitutional doctrine. Whether, in order to provide it with means of controlling its docket, review in a particular court has been made permissive or whether initial access to the court is as of right, the convicted felon is equally in need of the aid of counsel. Nor do we think that the fact that Moffitt in these cases, as Douglas in *Douglas v. California*, had been furnished counsel in an appeal to an intermediate court permits a deprivation of assigned counsel in further proceedings to obtain review in a higher state appellate court. As long as the state provides such procedures and allows other convicted felons to seek access to the higher court with the help of retained counsel, there is a marked absence of fairness in denying an indigent the assistance of counsel as he seeks access to the same court. As Mr. Justice Harlan observed, "Surely, it cannot be contended that the requirements of fair procedure are exhausted once an indigent has been given one appellate review." *Douglas v. California*, 372 U.S. 353, 366 (dissenting opinion).

Two Courts of Appeals have held that the questions reserved in *Douglas* should be answered in the negative. In *Pennington v. Pate*, 7 Cir., 409 F.2d 757, it was held that Illinois fully

discharged its constitutional obligations by providing assigned counsel for an indigent's appeal to an intermediate appellate court and it was not required to provide counsel to assist the indigent as he sought access to the Supreme Court of Illinois. In *Peters v. Cox*, 10 Cir., 341 F.2d 575, it was held that New Mexico had no obligation to provide an indigent with the assistance of counsel to prepare and file in the Supreme Court of the United States a petition for certiorari to the Supreme Court of New Mexico.

We need not quarrel with those cases. What is requisite today may not have been constitutionally requisite ten years ago, or even a few years ago. As our legal resources grow, there is a correlative growth in our ability to implement basic notions of fairness. Few of the concepts of due process entertained today were born full blown. They grew. The transition from *Betts v. Brady*, 316 U.S. 455 to *Gideon v. Wainwright*, 372 U.S. 335, to *Argersinger v. Hamlin*, 407 U.S. 25, is an example. The Bar is large enough and strong enough now to meet the requirements of *Gideon* and *Argersinger;* it well may not have been even a few years ago.

Yet it is a relatively minor burden we would impose on the Bar by this decision. Once a lawyer has handled one appeal, and is thoroughly familiar with the case, the issues, and the authorities, it is a relatively simple and easy task for him to prepare and file a petition for further discretionary review in a higher appellate court. That is all that is involved in these cases, for the prevailing practice of second tier appellate courts, having a discretionary jurisdiction, has been to appoint counsel for indigents once certiorari has been granted.

If, however, in deference to our brothers of the Courts of Appeals of the Seventh and Tenth Circuits, we notice the possible impact of changing times, the Supreme Court's rationale in *Douglas* plainly seems to require the result we reach. The majority opinion talks in terms of equality. If the holding be grounded on the equal protection clause, inequality in the

circumstances of these cases is as obvious as it was in the circumstance of *Douglas*.[2] If the holding in *Douglas* were grounded on the due process clause, and Mr. Justice Harlan in dissent thought the discourse should have been in those terms, due process encompasses elements of equality. There simply cannot be due process of the law to a litigant deprived of all professional assistance when other litigants, similarly situated, are able to obtain professional assistance and to be benefited by it. The same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals.

III

What we have said about the Mecklenburg case and Moffitt's right to counsel while seeking access to the Supreme Court of North Carolina also applies to the Guilford case and his right to assistance of counsel in seeking access to the Supreme Court of the United States, provided he raised a federal question appropriate for review in the Supreme Court of the United States. We have had no opportunity to examine the papers filed in the North Carolina Supreme Court in that case, so the Guilford County case will be remanded to the District Court with instructions to examine the papers in the state Supreme Court to determine if a federal question was presented to that court which appropriately might have been reviewed by the Supreme Court of the United States.

Ordinarily, an inferior court should not withhold counsel because it thinks a particular question reviewable by a higher appellate court lacks substantiality. In the circumstances of this case, however, where the only remedy available to the District Court would be the prisoner's release on a writ of habeas corpus, we think it appropriate that on remand, if the District Court finds that one or more questions in the North Carolina Supreme Court was couched in federal terms, it may

[2] *See* Day, *Coming: The Right to Have Assistance of Counsel at All Appellate Stages*, 52 A.B.A.J. 135.

appraise the substantiality of the federal claim, and, if it appears patently frivolous, it may deny the writ.

IV

Of course, we do not presume to influence the practice in the Supreme Court of the United States or in the Supreme Court of North Carolina with respect to the assignment of counsel in cases involving indigents after grants of writs of certiorari. The Supreme Court of the United States traditionally assigns a member of its Bar to represent indigents in such cases. We are concerned only with the preparation and filing of a petition for a writ of certiorari, a step which takes place before the litigant can reach the threshold of the Supreme Court. Our holding is only that the indigent litigant with a federal claim must be provided with the legal assistance at that stage, so that the litigant may have the benefit of professional counsel and the Supreme Court the assistance which inevitably flows from the preparation of petitions for certiorari by professionals instead of by untutored criminal defendants.

Finally, we may emphasize that we are dealing with the rights of defendants in criminal cases. Nothing which we have said should be taken as having any application in any collateral, civil proceeding, though it may call into question the validity of a previous criminal conviction.

V

In addition to his right to counsel claims, Moffitt complains that he was not furnished with a transcript of the Guilford County trial. The Public Defender was furnished with such a transcript, but Moffitt claims to have had no access to it. The District Court denied this claim on the ground that Moffitt had shown no particularized need for it. We now affirm as to that. In further proceedings, his lawyer may have need for that transcript, but Moffitt has shown nothing to warrant a conclusion that he personally needs one.

VI

For these reasons, the Mecklenburg County case will be remanded to the United States District Court for the Western District of North Carolina, with instructions to issue the writ, unless, within a reasonable time, North Carolina shall provide Moffitt with the assistance of a lawyer for the purpose of preparing and filing a petition for a writ of certiorari in the Supreme Court of North Carolina, and provided that Court shall receive the petition and not dismiss it as being untimely. The Guilford County case is remanded to the United States District Court for the Middle District of North Carolina, with directions to examine the contentions made by Moffitt in the Supreme Court of North Carolina and to grant the writ of habeas corpus, if, in the Supreme Court of North Carolina, Moffitt asserted a substantial federal claim reviewable by the Supreme Court of the United States on a writ of certiorari.

Affirmed in part; reversed in part, and remanded.

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v.

CLAUDE FRANKLIN MOFFITT,
Respondent.

and

MAJOR FRED R. ROSS AND
STATE OF NORTH CAROLINA,
Petitioners,

v.

CLAUDE F. MOFFITT,
Respondent.

BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INTEREST OF THE AMICUS CURIAE

The Petition for a Writ of Certiorari in this case was docketed in this Honorable Court on November 15, 1973, and the opinion of the United States Court of Appeals may

be found in *Moffitt* v. *Ross,* 483 F.2d 650 (4th Cir. 1973).

The decision of the United States Court of Appeals for the Fourth Circuit in Case No. 72-1720, which was the case in the Court below dealing with the collateral attack on a conviction in Guilford County, North Carolina, is of particular concern to the Commonwealth of Virginia because the holding of the Court of Appeals in that case would require Virginia, through its Supreme Court, to appoint counsel to assist a criminal defendant in petitioning this Honorable Court for a Writ of Certiorari if a Federal question appropriate for review in this Court were raised. The holding of the Court of Appeals in the other case, Case No. 72-2480, is of only tangential interest to the Commonwealth of Virginia because it requires North Carolina to provide appellate counsel not only for an appeal as of right but also for a discretionary appeal to the Supreme Court of North Carolina. As the Court of Appeals points out, Virginia's appellate process consists of a single stage with discretionary acceptance of review at that stage but Virginia provides counsel for that appeal. Consequently, Virginia's principal concern is with the holding in Case No. 72-1720 but that concern is a very real one as Virginia does not now provide counsel to assist defendants in seeking review before this Honorable Court, nor does Virginia have any statutory or administrative framework for so appointing and compensating counsel.

Perhaps one barometer as to the possible impact of this ruling upon Virginia, and this Honorable Court, would be the impact that the prior holding of the United States Court of Appeals for the Fourth Circuit in *Nelson* v. *Peyton,* 415 F.2d 1154 (4th Cir. 1969), had on the Commonwealth. In that case the Court of Appeals held that at the close of a criminal trial there was an obligation on either the trial court or counsel to advise the defendant of his right to

appeal, a procedure that was not previously followed by Virginia. In the three years preceding the decision in *Nelson*, a total of 1092 Writs of Error were either granted or refused in criminal cases by the Supreme Court of Virginia—an average of 364 cases a year. In the comparable three year span following the decision in Nelson, 1970-1972, a total of 1906 Writs of Error were acted upon by the Supreme Court of Virginia—an average of 635 cases per year. This is a remarkable increase that cannot be totally attributed to the normal increase in criminal prosecutions.

An additional concern on the part of the Amicus Curiae is the probable impact of providing counsel for the seeking of review in this Honorable Court and, in light of *Nelson*, the probable obligation on appellate counsel to advise his client of these rights after the Writ of Error is refused by the Supreme Court of Virginia, and in a case where review was granted and it has been decided adverse to the defendant. There will obviously be a material increase in the number of Petitions for Writs of Certiorari filed in this Court from Virginia, as well as from the other states within the Fourth Circuit—and the Commonwealth will be responsible for preparing, reproducing and filing Briefs in Opposition to the Granting of a Writ of Certiorari or Motions to Dismiss or Affirm in direct review cases filed herein. Thus, there will be a substantial increase in the workload of the Criminal Litigation Division of the Office of the Attorney General of Virginia, and this increase would come at a time when the emphasis in that office has shifted toward providing greater technical support to local law enforcement and prosecutorial officials so as to improve the administration of the criminal justice system.

Lastly, but not least, the Amicus Curiae, like all those properly concerned with the effective and efficient disposition of cases in this Honorable Court, is disturbed by the

probable impact of the Court of Appeals decision on the caseload of this Honorable Court. As Chief Justice Burger pointed out in his annual report on the state of the Federal judicial branch to the American Bar Association, the number of docketed cases before this Court increased from 1463 in 1953 to 4640 in 1972 (Burger, *Report on the Federal Judicial Branch—1973,* 59 A.B.A.J. 1125, 1129 (1973)). If the decision of the Court below is allowed to stand, a comparable increase might be possible within a space of two or three years rather than 19.

Accordingly, the Commonwealth of Virginia, with the sponsorship of its Attorney General, offers this brief in support of the petitioner's argument that counsel should not be provided as a constitutional right to assist State prisoners in seeking review of state appellate court determinations in this Honorable Court.

ARGUMENT

This Honorable Court Should Grant A Writ Of Certiorari In The Instant Case To Review The Decision Of The United States Court Of Appeals For The Fourth Circuit That A State Must Provide Counsel At Every Stage In The Appellate Process From A Criminal Conviction, Including The Discretionary Portion Of A Two-Tier Appellate System And For The Seeking Of Review In The Supreme Court Of The United States, Especially Where The Decision Of The Court Below Is Contrary To The Prior Practices Of This Court And Is Contrary To The Express Holding Of The United States Court Of Appeals For The Tenth Circuit In Peters v. Cox, 341 F.2d 575 (10th Cir. 1965), And To The Implicit Holding Of The Seventh Circuit In United States ex rel. Pennington v. Pate, 409 F.2d 757 (7th Cir. 1969).

The United States Court of Appeals for the Fourth Circuit prefaced their decision in these cases by acknowledging that they were "met with the questions reserved by the

Court in *Douglas* v. *California*, 372 U.S. 353." (483 F.2d at 650). The Court below then proceeded to decide those "questions reserved" in a manner so as to have a decided impact on the administration of the appellate portion of the criminal justice system. As previously pointed out, and as recognized by the Court below, the Commonwealth of Virginia has no specific concern with the decision of the Court of Appeals in Case No. 72-2480, as Virginia has, at the present time, a single-tier appellate system and counsel are provided for indigent criminal defendants at all stages in that process (483 F.2d at 653-654). However, Virginia does not presently have any procedure for requiring advice to unsuccessful criminal defendants in State appeals that they have a right to seek further review in the Supreme Court of the United States, nor does Virginia have any process whereby counsel will be provided to assist indigent defendants in seeking such review if the defendant seeks to avail himself of this opportunity. Consequently, the decision of the Court of Appeals with regard to this latter point is of great concern to the Amicus Curiae.

The Court below acknowledges that the Seventh and Tenth Circuits, in *Pennington* and *Peters*, had held to the contrary but the Court felt that these decisions in 1969 and 1965, respectively, were essentially outdated within the context of what was now "constitutionally requisite" (483 F.2d at 655). In *Peters*, the Tenth Circuit Court of Appeals held as follows:

> "The question presented in this habeas corpus appeal is whether the Supreme Court of New Mexico denied appellant's constitutional rights by refusing in failing to appoint counsel to assist him in taking an appeal in a criminal case from that Court to the Supreme Court of the United States. We hold that there has been no

denial of constitutional rights under the circumstances of this case." (341 F.2d at 575).

Similarly, although the United States Court of Appeals for the Seventh Circuit was concerned with the question decided by the Court below in Case No. 72-2480, the Court partially based its determination on the practices of this Honorable Court in Petitions for Writs of Certiorari:

> "We find support for our decision in the present practice of the United States Supreme Court with regard to petitions for writs of certiorari. The United States Supreme Court's disposition of a petition for a writ of certiorari is as fully discretionary as the Illinois Supreme Court's decision to grant a Rule 315 appeal. Both determinations are made after one appeal as of right has occurred. If we were to hold for the petitioner here, we would be saying a fortiori that the Supreme Court's present practice of not granting counsel for the purpose of preparing certiorari petitions is contrary to equal protection under the Constitution. This we are unwilling to do." (409 F.2d at 760).

The dissenting justices in the case of *Douglas* v. *California*, 372 U.S. 353 (1963), similarly relied on the practices of this Honorable Court (See dissenting opinion of Justice Clark, 372 U.S. at 359: dissenting opinion of Mr. Justice Harlan, joined by Mr. Justice Stewart, 372 U.S. at 365-366).

This Honorable Court's practice has been described in Stern & Gressman, *Supreme Court Practice* (4th Ed. 1969), as follows:

> *"No appointment of counsel before grant of review.* The court has steadfastly refused to appoint counsel to assist an unrepresented indigent, prior to the grant of review, in preparing a petition for certiorari or jurisdictional statement or any other preliminary motion or document. Requests for counsel at such early

stages have uniformly been rejected through the Clerk, acting on instructions from the Court. While the correctness and indeed the constitutionality of this refusal to appoint counsel to prepare the documents at this critical stage of Supreme Court litigation has been questioned at least with respect to the direct review of criminal prosecutions, there is no indication as yet that the court will change its policy in this respect." (Id. at 378; fn. omitted).

Where, as here, the decision of a court of appeals is in direct conflict with the prior decisions of two other circuit courts of appeals and is additionally in direct conflict with the prior practices of this Honorable Court and, as here, especially where the decision has such a decided impact upon the future course of the administration of justice, it would be appropriate to grant a Writ of Certiorari and review that decision.

CONCLUSION

For the foregoing reasons, the Commonwealth of Virginia as Amicus Curiae on behalf of the petitioner herein respectfully requests this Honorable Court to grant a Writ of Certiorari to the judgments of the United States Court of Appeals for the Fourth Circuit and to reverse the decision of the Court of Appeals and remand the case to the Court of Appeals for the Fourth Circuit with directions to

vacate its opinion and to remand the cases to the District Courts with instructions to dismiss the Petitions for Writs of Habeas Corpus.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of Virginia

ROBERT E. SHEPHERD, JR.
Assistant Attorney General

Supreme Court–State Library Building
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CERTIFICATE OF SERVICE

I, Robert E, Shepherd, Jr., an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 30th day of November, 1973, I mailed copies of the foregoing brief of Amicus Curiae in support of Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit by first-class mail to Honorable Robert Morgan, Attorney General of North Carolina, P. O. Box 629, Raleigh, North Carolina 27602, counsel for petitioners, and to Thomas B. Anderson, Jr., Esquire, Loflin, Anderson, Loflin and Goldsmith, 811 West Main Street, Durham, North Carolina, of counsel for respondent.

ROBERT E. SHEPHERD, JR.
Assistant Attorney General

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-786

MAJOR FRED R. ROSS, and
STATE OF NORTH CAROLINA,

Petitioners,

-vs-

CLAUDE FRANKLIN MOFFITT,

Respondent.

BRIEF OF THE STATE OF FLORIDA AS AMICUS CURIAE

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COUNSEL FOR THE
STATE OF FLORIDA

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-vs-

CLAUDE FRANKLIN MOFFITT,

Respondent.

BRIEF OF THE STATE OF FLORIDA AS AMICUS CURIAE

PRELIMINARY STATEMENT

The State of Florida will be referred to herein as Florida.

THE INTEREST OF THE STATE OF FLORIDA AS AMICUS CURIAE

The issue presented in the case at bar applies to Florida inasmuch as Florida has followed this Honorable Court's decision in Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), and thus has only provided counsel to indigent defendants on appeals in criminal cases. Florida gives an appeal to a defendant in a criminal case as a matter of right. Sections 924.05 and 924.06, Florida Statutes, and State ex rel. Seay v. Mayo, 137 Fla. 781, 189 So.2d 26 (1939).

Furthermore, Florida, in keeping with Douglas, supra, does not recognize a constitutional right to counsel of an indigent defendant seeking discretionary review by petition for writ of certiorari. In Hooks v. State, 253 So.2d 424, 426, 427 (Fla. 1971), certiorari denied, 405 U.S. 1044, 31 L.Ed.2d 587, 42 S.Ct. 1330 (1972), the Supreme Court of Florida held:

> "The petitioner has no absolute right to appointed counsel in presenting his petition for certiorari in the case sub judice. The question in each proceeding of this nature before this Court should

be whether, under the circumstances, the assistance of counsel is essential to accomplish a fair and thorough presentation of the petitioner's claims. Of course, doubts should be resolved in favor of the indigent petitioner when a question of the need for counsel is presented. Each case must be decided in the light of the Fifth Amendment due process requirements. See State v. Weeks, 166 So.2d 892 (Fla.1964), where the Court held that a prisoner had no absolute right to assistance of counsel on an appeal from an adverse ruling on his motion for post-conviction relief, although Fifth Amendment due process would require such assistance if the post-conviction motion presented an apparently substantial, meritorious claim for relief, and if the allowed hearing was potentially so complex as to suggest the need."

* * *

"The questions presented in the petition for writ of certiorari are not so complex as to require the appointment of counsel in order to accomplish a fair and thorough presentation of petitioner's claims to this

> Court. Petitioner's motion for appointment of counsel is denied. . . . ."
> Hooks, supra, pages 426-427. (Emphasis supplied)

Accordingly, it is in the best interest of Florida to appear as amicus curiae in the case at bar in opposition to Respondent Moffitt's position, inasmuch as this single appeal may result in jeopardizing the convictions of all criminal defendants in Florida who have not been provided counsel to seek certiorari from the Florida Supreme Court and this Honorable Court, and in excessively burdening the administration of justice in Florida's appellate courts as well as the work load of those responsible as counsel in certiorari proceedings.

QUESTION PRESENTED

DOES THE FOURTH CIRCUIT COURT OF APPEALS' ORDER, GRANTING AN INDIGENT DEFENDANT THE CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF ASSIGNED COUNSEL IN IN SEEKING FURTHER DISCRETIONARY REVIEW BY WRIT OF CERTIORARI (1) IN THE STATE'S HIGHEST COURT, AND (2) IN THE UNITED STATES SUPREME COURT, CONSTITUTE REVERSIBLE ERROR?

ARGUMENT

The question presented above should be answered in the affirmative under the rules of law and reasons announced in decisions in the United States Courts of Appeals for the Seventh and Tenth Circuits, and this Honorable Court denied certiorari in both cases. Pennington v. Pate, 409 F.2d 757 (7th Cir., 1969), cert.den., 396 U.S. 1042, 24 L.Ed.2d 686, 90 S.Ct. 689 (1970); and Peters v. Cox, 341 F.2d 575 (10th Cir., 1965), cert.den., 382 U.S. 863, 15 L.Ed.2d 101, 86 S.Ct. 126 (1965).

Firstly, as noted in Pennington v. Pate, supra, this Honorable Court in Douglas v. California, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814 (1963), explicitly refused "to extend the right of counsel to the second appeal stage." Pennington, supra, 409 F.2d at page 760, where the Court noted:

> "We find support for our decision in the present practice of the United States Supreme Court with regard to petitions for writs of certiorari. The United States Supreme Court's disposition of a petition for a writ of certiorari is as fully discretionary as the Illinois Supreme Court's decision to grant a Rule 315 appeal. Both determinations are made after one appeal

as of right has occurred. If we were to hold for the petitioner here, we would be saying a fortiori that the Supreme Court's present practice of not granting counsel for the purpose of preparing certiorari petitions is contrary to equal protection under the Constitution. This we are unwilling to do." (Emphasis supplied)

Cf.: United States v. Nelson, 275 F.Supp. 261, 264 (D.C. Cal., 1967), where the Court stated:

"As far as petitions for certiorari to the United States Supreme Court are concerned, the right to that remedy is provided by federal law (28 U.S.C. §2101(d), and U.S. Supreme Court Rules 19-20) and, as noted by Justice Harlan in his dissent in Douglas v. People of State of California (1963), 372 U.S. 353, at pp. 365-366, 83 S.Ct. 814 at pp. 820-821, 9 L.Ed.2d 811, any constitutional requirement for the appointment of counsel to prepare or prosecute such petitions would seem to rest, not upon the State of California, but upon the United States Supreme Court which has nevertheless, followed the practice of both granting and denying such petitions without

> appointment of counsel, even when presented by defendants who file as indigents (Emphasis supplied) in propria persona (Emphasis supplied by Court)." United States v. Nelson, supra, at page 264.

Secondly, as noted in Pennington, supra, 409 F.2d at page 760:

> "A second reason for not imposing on the Illinois Supreme Court the duty of providing counsel for every petitioner seeking a discretionary appeal is that, if in fact a petitioner, such as Pennington, does have a meritorious constitutional claim which he has heretofore failed to assert, this claim has either been waived and so could not under any circumstances be presented to the Illinois Supreme Court on appeal or it concerns such a fundamental right that an adequate remedy still exists in the form of the Illinois Post-Conviction Hearing Act, Ill.Rev. Stat. ch. 38 § 122-1 et seq. (1967). Concerning the post-conviction hearing procedure, the Illinois Supreme Court has held that a petitioner in such a proceeding is entitled to the assistance of a lawyer in the presentation of his original

> petition or in the preparation of an amended petition if necessary. People v. Wilson, 39 Ill.2d 275, 235 N.E.2d 561 (1968)."
> (Emphasis supplied.)

Florida, likewise, has a procedure for hearing constitutional claims not raised in a direct appeal, which is Rule 3.850, Florida Rules of Criminal Procedure, titled "Post-Conviction Relief." When complex legal issues are presented in a motion for post-conviction relief under Rule 3.850, supra, the trial court to which the motion is presented is authorized to appoint counsel to represent an indigent movant, both at the hearing on the motion and on appeal from an order of denial entered on the motion. State v. Weeks, 166 So.2d 892 (Fla. 1964); Herzig v. State, 200 So.2d 632 (4 DCA Fla., 1967), cert.disch., 208 So.2d 619 (Fla. 1968). As noted in Herzig, supra, 208 So.2d at page 621, the test of deciding whether to appoint counsel is:

> ". . . [W]hether under the circumstances the assistance of counsel is essential to accomplish a fair and thorough presentation of the prisoner's claim."

Cf.: Hooks v. State, supra, at 253 So.2d 426, 427. See also the concurring opinion

in Pennington, supra, 409 F.2d at page 762:

> "My Concurrence in the result is based on my belief that prisoner-petitioners in Illinois are not prejudiced by the failure to supply counsel here due to the existence of Illinois' post-conviction hearing procedures. As noted by the majority it has been held that counsel must be appointed for indigents to aid in the preparation and presentation of their first post-conviction petitions. It is my understanding that the review afforded by this procedure is sufficient to review any significant and meritorious claims of constitutional error in any of the prior proceedings. Until we are shown a case in which this procedure is inadequate or unable to review such constitutional questions which could have been presented in an appeal of right under Rule 317, I will regard the procedure as a sufficient substitute for the appointment of counsel to assist in petitions for review under Rule 317." (Emphasis supplied.)

Thirdly, the nature of certiorari in the Florida Supreme Court is such that it does not issue as a matter of right, but rests in the sound discretion of the Court, and does not serve the purpose of an appeal. Article V, Section 3(b)(3), Florida Constitution; and First National Bank v. Gibbs, 82 So. 618 (1919). In light of these authorities, Florida respectfully urges that certiorari is no part of a direct appeal, and that it should be correctly looked to as a collateral attack on the conviction, similar in substance to a motion under Rule 3.850, supra. However, procedurally certiorari certainly involves the exercise of discretion, which is not permitted under Rule 3.850, supra. It seems clear that a defendant's claims stand a far better chance of being adjudicated under Rule 3.850, supra, than under the discretionary procedures of certiorari in the Supreme Court of Florida.

Nevertheless, the Fifth Circuit Court of Appeals held in Abraham v. Wainwright, 407 F.2d 826, 827 (1969), that an indigent defendant has no constitutional right to counsel in a collateral attack on the conviction. The Court stated at 407 F.2d 827, 828:

> "The sole question certified for appeal is whether the state appellate court erred in denying the appellant's request for appointment of counsel on appeal from denial of his motion to vacate the judgment pursuant to Florida Cr.P. Rule

1.850, 33 F.S.A.

"It is clear to us that there was no violation of appellant's federally protected rights. There is a sharp distinction between the direct appeal from a conviction and a collateral attack on the conviction. An indigent defendant has the constitutional right to counsel on direct appeal, Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); there is no such right to counsel in post-conviction proceedings, Stanley v. Wainwright, 5 Cir., 1969, 406 F.2d 8; Fleming v. United States, 5 Cir., 1966, 367 F.2d 555; Ford v. United States, 5 Cir., 1966, 363 F.2d 437; Putt v. United States, 5 Cir., 1966, 363 F.2d 369. This is also the rule in Florida. State v. Herzig, 208 So.2d 619 (Fla. 1968); State v. Weeks, 166 So.2d 892 (Fla. 1964)."
Abraham, supra, pages 827-828. (Emphasis supplied)

The conclusion is inescapable that the discretionary procedures of review by certiorari carry no constitutional right to counsel, inasmuch as the non-discretionary procedure for post-conviction relief under Rule 3.850, supra, creates no absolute right to counsel, as held in

Abraham, supra.

Accordingly, Florida respectfully submits that the decision in Hooks v. State, supra, 253 So.2d 424, 426, 427 (Fla. 1971), cert. den., 405 U.S. 1044, 31 L.Ed.2d 587, 92 S.Ct. 1330 (1972), should be looked to as authoritative with respect to the issue presented in the case at bar, and that the following test relied on in Hooks should be adopted as controlling:

> "The petitioner has no absolute right to appointed counsel in presenting his petition for certiorari in the case sub judice. The question in each proceeding of this nature before this Court should be whether, under the circumstances, the assistance of counsel is essential to accomplish a fair and thorough presentation of the petitioner's claims. Of course, doubts should be resolved in favor of the indigent petitioner when a question of the need for counsel is presented. Each case must be decided in the light of the Fifth Amendment due process requirements . . . ." (Emphasis supplied) Hooks, supra, at page 426.

CONCLUSION

Under the authorities reviewed above, and for the foregoing reasons, the question presented herein should be answered in the affirmative, and the decision of the Court of Appeals in the case at bar should be reversed.

Respectfully submitted,

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32304

COUNSEL FOR THE
STATE OF FLORIDA

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Brief of the State of Florida as Amicus Curiae have been furnished the following:

The Honorable Robert Morgan
Attorney General; and

The Honorable Jacob L. Safron
Assistant Attorney General
Department of Justice
State of North Carolina
Post Office Box 629
Raleigh, North Carolina,
27602; and

The Honorable Thomas B. Anderson
Attorney at Law
Post Office Box 1315
Durham, North Carolina
27702,

counsel for the petitioners and the respondent, respectively, via U.S. Mail, this _____day of February, 1974.

ENOCH J. WHITNEY
Assistant
Attorney General

In The

Supreme Court of the United States

October Term, 1973

No. 73-705

MAJOR FRED R. ROSS AND
STATE OF NORTH CAROLINA,
Petitioners,

v.

CLAUDE FRANKLIN MOFFITT,
Respondent.

MAJOR FRED R. ROSS AND
STATE OF NORTH CAROLINA,
Petitioners,

v.

CLAUDE F. MOFFITT,
Respondent.

BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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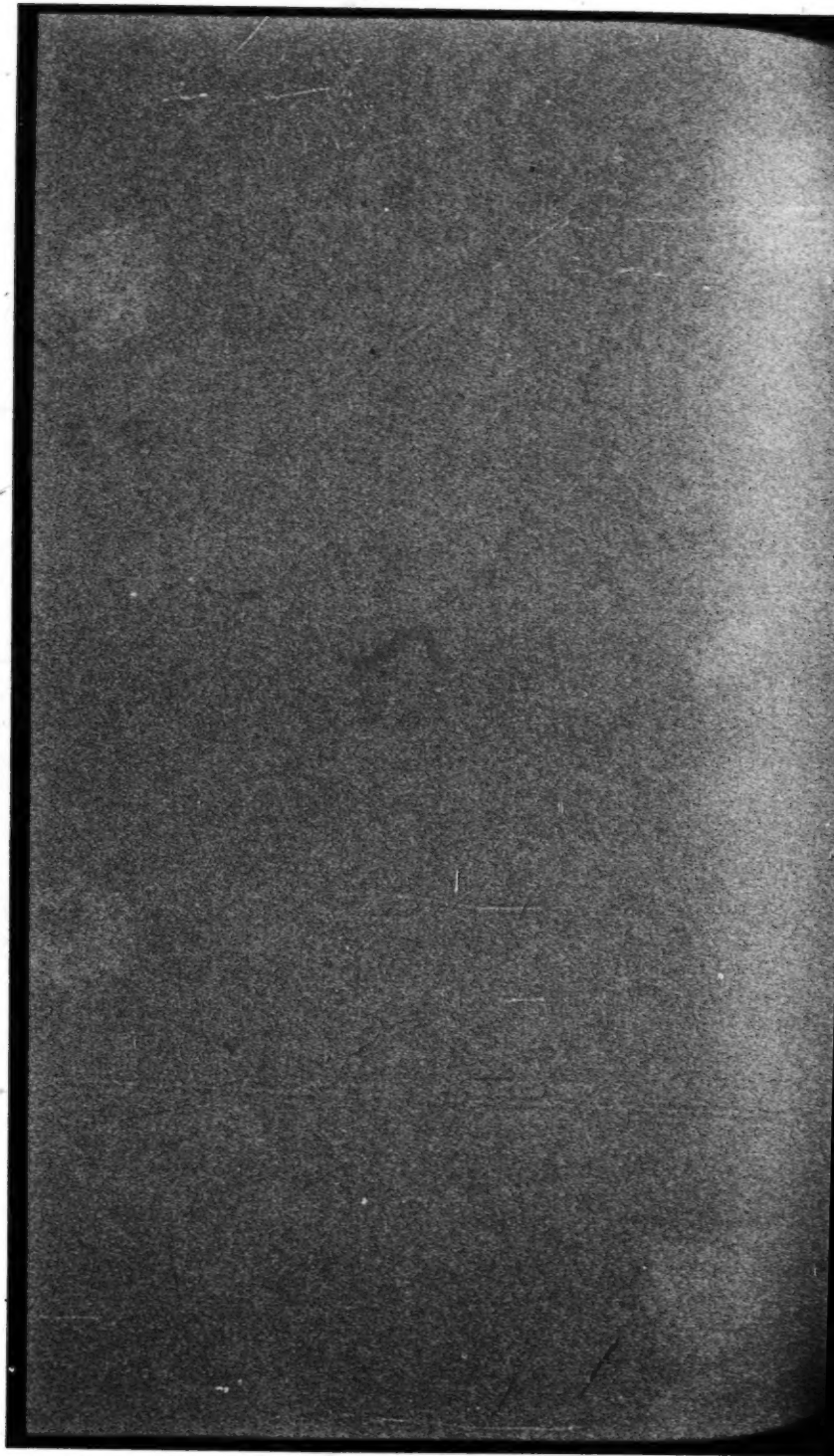

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CLAUDE FRANKLIN MOFFITT,
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MAJOR FRED R. ROSS AND
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CLAUDE F. MOFFITT,
Respondent.

BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INTEREST OF AMICUS CURIAE

The Petition for a Writ of Certiorari in this case was docketed in this Honorable Court on November 15, 1973, and the opinion of the United States Courts of Appeals for the Fourth Circuit may be found in *Moffitt* v. *Ross,* 483

F.2d 650 (4th Cir. 1973). The Petition for a Writ of Certiorari was granted by order of this Court dated January 7, 1974.

The decision of the United States Court of Appeals for the Fourth Circuit in Case No. 72-1720, which was the case in the Court below dealing with the collateral attack by way of a Petition for a Writ of Habeas Corpus on a conviction in Guilford County, North Carolina, is of particular concern to the Commonwealth of Virginia because the affirmance of the holding of the Court of Appeals in that case would require Virginia, through its Supreme Court, to appoint counsel to assist a criminal defendant in petitioning this Honorable Court for a Writ of Certiorari if a federal question appropriate for review in this Court were raised. The holding of the Court of Appeals in the other case, Case No. 72-2480, is of only tangential interest to the Commonwealth of Virginia because it requires North Carolina to provide appellate counsel, not only for an appeal as of right to the intermediate Court of Appeals, but also for a discretionary appeal to the Supreme Court of North Carolina. As the Court of Appeals points out, Virginia's appellate process consists of a single stage with discretionary acceptance of review at that stage but Virginia provides counsel for that appeal. Consequently, Virginia's principal concern is with the holding in Case No. 72-1720, but that concern is a very real one as Virginia does not now provide counsel to assist defendants in seeking review before this Honorable Court, nor does Virginia have any existing statutory or administrative framework for so appointing and compensating counsel.

Perhaps one barometer as to the possible impact of the Fourth Circuit Court of Appeals' ruling on Virginia, and this Honorable Court, would be the impact that the prior holding of the United States Court of Appeals for the

Fourth Circuit in *Nelson* v. *Peyton*, 415 F.2d 1154 (4th Cir. 1969), had on the Commonwealth of Virginia. In that case the Court of Appeals held that at the close of a criminal trial there was an affirmative obligation on either the trial court or counsel to *sua sponte* advise the defendant of his right to appeal, a procedure that had not theretofore been followed in Virginia. In the three years preceding the decision in *Nelson*, a total of 1,092 writs of error were either granted or refused in criminal cases by the Supreme Court of Virginia—an average of 364 cases a year. In the comparable three year span following the decision in *Nelson*, 1970-1972, a total of 1,906 writs of error were acted upon by the Supreme Court of Virginia—an average of 635 cases per year. This is a remarkable and striking increase that cannot be totally attributed to the normal increase in criminal prosecutions.

An additional concern on the part of the amicus curiae is the probable impact of providing counsel for the seeking of review in this Honorable Court and, in light of the holding in *Nelson*, the probable obligation on appellate counsel to advise his client of his further appellate rights after review has been refused by the Supreme Court of Virginia, and in a case where review has been granted and the ultimate disposition has been unfavorable for the defendant, a similar obligation of advice will fall on appellate counsel in those cases. There will obviously be a material increase in the number of Petitions for Writs of Certiorari filed in this Court from around the country, and prosecutor's staffs or Attorneys General's staffs will be responsible for preparing, reproducing and filing Briefs in Opposition to the Granting of a Writ of Certiorari or Motions to Dismiss or Affirm in direct appeal cases filed in this Court. There will thus be a substantial increase in the workload, for example, of the Criminal Litigation Division of the Office of the At-

torney General of Virginia, and this increase would come at a time when the emphasis in that office has shifted towards providing greater technical support to local law enforcement and prosecutorial officials so as to improve the administration of the criminal justice system.

In addition, there will be a corresponding increase in post-conviction collateral proceedings where prisoners raise allegations relating to the denial of appeal or ineffectiveness of counsel for the alleged failure of their attorneys to advise them of their appellate rights or to pursue those rights. A significant number of these proceedings would necessitate plenary hearings as the allegations relate to matters that are outside the record and, significantly, unless this Honorable Court were to provide some mechanism for the late filing of Petitions for Writs of Certiorari in such cases that are decided in favor of the prisoner, the prisoner may be entitled to his release or to a re-trial on a Writ of Habeas Corpus although the alleged appellate deficit obviously had no direct impact on guilt or innocence or the fairness of the initial trial, and despite the fact that the court of last resort in the State had ruled that the prisoner had a fair trial.

Lastly, but not least, the amicus curiae, like all those properly concerned with the effective and efficient disposition of cases in this Honorable Court, is disturbed by the probable impact of the Court of Appeals' decision on the caseload of this Honorable Court. As Chief Justice Burger pointed out in his annual report on the state of the Federal Judicial Branch to the American Bar Association, the number of docketed cases before this Court increased from 1,463 in 1953 to 4,640 in 1972 (Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125, 1129 (1973)). The *Report of the Study Group on the Caseload of the Supreme Court*, often referred to as the "Freund Re-

port," also points to this geometric increase in the caseload of this Honorable Court and that report points to the fact that from 1941 to 1971 the number of *in forma pauperis* cases filed in this Court increased from 178 to 1,930 (57 F.R.D. 573, 579). From 1941 to 1971 the percentage of *in forma pauperis* petitions granted dropped from 9 percent to 3.3 percent, with the latter figure adjusted to exclude the petitions granted in the death penalty cases (57 F.R.D. at 580, 615). The Freund Study Group reached the following conclusions based on these impressive statistics:

> "The statistics of the Court's current workload, both in absolute terms and in the mounting trend, are impressive evidence that the conditions essential for the performance of the Court's mission do not exist. For an ordinary appellate court the burgeoning volume of cases would be a staggering burden; for the Supreme Court the pressures of the docket are incompatible with the appropriate fulfillment of its historic and essential functions.
>
> "Over the past thirty-five years, as has been seen, the number of cases filed has grown about fourfold, while the number of cases in which the Court has heard oral argument before decision has remained substantially constant. Two consequences can be inferred. Issues that would have been decided on the merits a generation ago are passed over by the Court today; and, second, the consideration given to the cases actually decided on the merits is compromised by the pressures of 'processing' the inflated docket of petitions and appeals.
>
> * * *
>
> "We are concerned that the Court is now at the saturation point, if not actually overwhelmed. If trends continue, as there is every reason to believe they will, and if no relief is provided, the function of the Court must necessarily change. In one way or another, plac-

> ing ever more reliance on an augmented staff, the Court could perhaps manage to administer its docket. But it will be unable adequately to meet its essential responsibilities." (57 F.R.D. at 581, 584).

If the decision of the United States Court of Appeals for the Fourth Circuit is allowed to stand in an unmodified form, the figures mentioned above would be extremely conservative and the inundation of this Court described by the Freund Study Group would be complete.

Accordingly, the Commonwealth of Virginia, joined by the State of California, with the sponsorship of their Attorneys General, offer this brief in support of the petitioner's argument that counsel should not be provided as a constitutional right to assist state prisoners in seeking review of state appellate court determinations in this Honorable Court. This brief of amicus curiae will be limited to the consideration of that issue—*the provision of counsel for the perfection of a Petition for a Writ of Certiorari after final action in the State appellate courts*—the issue involved in Case No. 72-1720 in the United States Court of Appeals for the Fourth Circuit.

QUESTIONS PRESENTED

I. Whether, as a constitutional right, a State must provide counsel at every stage in the appellate process from a criminal conviction, including the seeking of review in the Supreme Court of the United States?

II. Whether, if this Honorable Court feels that the first question should be answered in the affirmative, some modification of the prior holdings of this court should be made so as to require the seeking of certiorari, as a necessary element in the exhaustion of State remedies within the meaning of 28 U.S.C. § 2254 or so as to provide that the

denial of certiorari by this Honorable Court to a State prisoner constitutes an adjudication by this Court that the prisoner is not "in custody in violation of the Constitution or laws or treaties of the United States" so as to preclude Federal habeas corpus under 28 U.S.C. § 2241?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment to the Constitution of the United States:

Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 United States Code § 2241:

(a) Writs of habeas corpus may be granted by the

Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the

district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 United States Code § 2254:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written

opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in

paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

STATEMENT OF THE CASE

The specific facts which gave rise to this action are fully set out in the Brief for the Petitioner and the amicus will accordingly not repeat those matters but will concentrate instead during the course of this brief on the broader national impact of the Court's decision in this case.

ARGUMENT

I.

The United States Court Of Appeals For The Fourth Circuit Erred In This Case In Ruling That A State Must, As A Constitutional Right, Provide Counsel At Every Stage In The Appellate Process From A Criminal Conviction, Including The Discretionary Portion Of A Two-Tier Appellate System And For The Seeking Of Review In This Honorable Court.

The United States Court of Appeals for the Fourth Circuit prefaced its decision in these cases by acknowledging that they were "met with the questions reserved by the Court in *Douglas* v. *California,* 372 U.S. 353" (483 F.2d at 650). The Court below then proceeded to decide those "questions reserved" in such a manner as to have a decided impact on the administration of the appellate portion of the criminal justice system. As previously pointed out, the Commonwealth of Virginia has no specific concern with the decision of the Court of Appeals in Case No. 72-2480 as Virginia has, at the present time, a single tier appellate system and counsel are provided for indigent criminal defendants at all stages in that process (483 F.2d at 653-654).

However, Virginia presently has no procedure for requiring advice to unsuccessful criminal defendants in State appeals that they have a right to seek further review in this Honorable Court, nor does Virginia have any existing process whereby counsel would be provided to assist indigent defendants in seeking such review if the defendant wishes to avail himself of this opportunity. Consequently, the decision of the Court of Appeals with regard to this latter point is of great concern to the amicus curiae.

The Court below acknowledges that the Seventh and Tenth Circuit Courts of Appeals, in *United States ex rel Pennington* v. *Pate,* 409 F.2d 757 (7th Cir. 1969) and *Peters* v. *Cox,* 341 F.2d 575 (10th Cir. 1965), had held to

the contrary but the Court below felt that these decisions in 1969 and 1965, respectively, were essentially outdated within the context of what was now "constitutionally requisite" (483 F.2d at 655). In *Peters,* the United States Court of Appeals for the Tenth Circuit held as follows:

> "The question presented in this habeas corpus appeal is whether the Supreme Court of New Mexico denied appellate's constitutional rights by refusing and failing to appoint counsel to assist him in taking an appeal in a criminal case from that court to the Supreme Court of the United States. We hold that there has been no denial of constitutional rights under the circumstances of this case.
>
> "It is, of course, the law that the due process clause of the Fourteenth Amendment to the Constitution requires the appointment of counsel to represent an indigent defendant in a state criminal trial. *Gideon* v. *Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; *Hickock* v. *Crouse,* 10 Cir., 334 F.2d 95. It is also the law that under the due process and equal protection clauses of the Fourteenth Amendment, an indigent defendant has a right to appointed counsel on the appeal of a state criminal conviction. *Douglas* v. *People of California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811. But, we have been cited to no authority requiring, or even permitting, a state supreme court to appoint counsel for an indigent defendant to represent him on his appeal to the Supreme Court of the United States. Our own research has revealed none. The judgment below is therefore affirmed." (341 F.2d at 575).

Similarly, although the United States Court of Appeals for the Seventh Circuit was primarily concerned with the question decided by the Court below in Case No. 72-2480, the Court in *Pennington* partially based its determination on the practices of this Honorable Court in Petitions for Writs of Certiorari:

> "We find support for our decision in the present practices of the United States Supreme Court with regard to petitions for writs of certiorari. The United States Supreme Court's disposition of a petition for a writ of certiorari is as fully discretionary as the Illinois Supreme Court's decision to grant a Rule 315 appeal. Both determinations are made after one appeal as of right has occurred. If we were to hold for the petitioner here, we would be saying a fortiori that the Supreme Court's present practice of not granting counsel for the purpose of preparing certiorari petitions is contrary to equal protection under the Constitution. This we are unwilling to do." (409 F.2d at 760).

The dissenting justices in the case of *Douglas* v. *California*, 372 U.S. 353 (1963), similarly relied on the practices of this Honorable Court. Mr. Justice Clark, in dissenting, made the following statement:

> "With this new fetish for indigency the Court piles an intolerable burden on the state's judicial machinery. Indeed, if the Court is correct it may be that we should first clean up our own house. We have afforded indigent litigants much less protection than has California. Last Term we received over 1,200 in forma pauperis applications in none of which had we appointed attorneys or required a record. Some were appeals of right. Still we denied the petitions or dismissed the appeals on the moving papers alone. At the same time we had hundreds of paid cases in which we permitted petitions or appeals to be filed with not only records but briefs by counsel, after which they were disposed of in due course. . . ." (372 U.S. at 359).

The dissenting opinion of Mr. Justice Harlan, joined by Mr. Justice Stewart, similarly alluded to the practices of this Honorable Court:

> "What the Court finds constitutionally offensive in

California's procedure bears a striking resemblance to the rules of this Court and many state courts of last resort on petitions for certiorari or for leave to appeal filed by indigent defendants pro se. Under the practice of this Court, only if it appears from the petition for certiorari that a case merits review is leave to proceed in forma pauperis granted, the case transferred to the Appellate Docket, and counsel appointed. Since our review is generally discretionary, and since we are often not even given the benefit of a record in the proceedings below, the disadvantages to the indigent petitioner might be regarded as more substantial than in California. But as conscientiously committed as this Court is to the great principle of 'Equal Justice Under Law,' it has never deemed itself constitutionally required to appoint counsel to assist in the preparation of each of the more than 1,000 pro se petitions for certiorari currently being filed each Term. We should know from our own experience that appellate courts generally go out of their way to give fair consideration to those who are unrepresented." (372 U.S. at 365-366).

This Honorable Court's practice has been described in Stern & Gressman, *Supreme Court Practice* § 11.2 (4th Ed. 1969), as follows:

> *"No appointment of counsel before grant of review.* The Court has steadfastly refused to appoint counsel to assist an unrepresented indigent, prior to the grant of review, in preparing a petition for certiorari or jurisdictional statement or any other preliminary motion or document. Requests for counsel at such early stages have uniformly been rejected through the Clerk, acting on instructions from the Court. While the correctness and indeed the constitutionality of this refusal to appoint counsel to prepare the documents at this critical stage of Supreme Court litigation have been questioned, at least with respect to the direct review of criminal prosecutions, there is no indication as yet that

> the Court will change its policy in this respect." (Id. at 378; fn. omitted; see also 1A *West's Federal Forms*, § 488 (Boskey Ed. 1969); Boskey, *The Right to Counsel in Appellate Proceedings*, 45 Minn. L. Rev. 783, 796-799 (1961).)

Stern and Gressman have pointed to the obvious practical problems involved in appointing counsel to assist in the preparation of an in forma pauperis certiorari proceeding. They point out:

> "Many of the *in forma pauperis* cases are completely without merit, but the Court would have no way of determining at this point which ones are of sufficient merit or difficulty to warrant the attention or assistance of counsel. Many of the requests might come so near the filing deadlines as to compel further delays in processing the cases in order to give counsel more time to study the case and prepare the necessary papers. And the sheer number of likely requests for counsel would soon create problems in selecting sufficient numbers of qualified counsel. Selection of counsel after a case has been studied and review has been granted, on the other hand, can be premised in part upon the counsel's expertise in the area of law involved." (Stern and Gressman at 378, fn. 15).

At the October Term, 1962, this Honorable Court dealt with a group of seven motions for appointment of counsel which directly presented this question to the court and yet in all seven cases this Honorable Court merely denied the motion (*Drumm* v. *California*, 373 U.S. 947 (1963); *Mooney* v. *New York*, 373 U.S. 947 (1963); *Womack* v. *Oregon*, 373 U.S. 947 (1963); *In re Jacobs*, 373 U.S. 947 (1963); *In re Diaz*, 373 U.S. 947 (1963); *In re Turner*, 373 U.S. 947 (1963); *Oppenheimer* v. *California*, 374 U.S. 819 (1963)). The index to the *Supreme Court Journal* for that Term records the fact that "at this time Clerk was

directed to follow policy of advising litigants that the Court would not appoint counsel to assist indigent litigants in preparing petitions for certiorari." (*Supreme Court Journal, October Term, 1962,* Index, p. iv.).

It is respectfully submitted that this Honorable Court should continue to adhere to its consistent practice and refuse to extend the Sixth Amendment right to counsel to the preparation of Petitions for Writs of Certiorari in this Honorable Court.

II.

If This Honorable Court Determines That The Sixth and Fourteenth Amendments To The Constitution Of The United States Mandate The Provision Of Counsel To Assist Indigent State Prisoners In Perfecting Review Of Their Convictions By This Court, Your Honors Should Also Reconsider The Weight And Effect That Such A Review Will Have On The Finality Of Criminal Proceedings By Holding That The Denial Of Certiorari Constitutes A Determination That The Prisoner Is Not In Custody In Violation Of Federal Constitutional Law So As To Preclude Federal Habeas Corpus Relief Or, At The Very Least, Reconsider The Court's Holding In Fay v. Noia, 372 U.S. 391, 435 (1963), That A State Prisoner Need Not Seek Certiorari In Order To Have Fully Exhausted His Available State Court Remedies.

If this Honorable Court determines that application for certiorari is such an indispensable and crucial stage of the criminal proceedings that the Sixth and Fourteenth Amendments to the Constitution of the United States mandate the appointment of counsel to assist an indigent defendant in perfecting a review by this Honorable Court, then your Honors should reconsider the weight to be given a denial of certiorari for the purpose of collateral, post-conviction proceedings, especially in the Federal courts.

This Honorable Court has rather consistently stated that the denial of certiorari is not to be construed as reflecting

the Court's views either as to the merits of the case or as to the Court's jurisdiction to hear the matter (Stern and Gressman, *supra*, § 5.7). Your Honors have frequently reiterated that "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the Bar has been told many times." (*United States* v. *Carver*, 260 U.S. 482, 490 (1923). See also *Brown* v. *Allen*, 344 U.S. 443, 451-452, 491-492 (1953); *Ohio ex rel. Eaton* v. *Price*, 360 U.S. 246, 247 (1959).) Mr. Justice Frankfurter was particularly persistent in commenting that the Court's refusal to grant certiorari was of no significance insofar as the issues before the Court were concerned (See *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 917-920 (1950); *Agoston* v. *Pennsylvania*, 340 U.S. 844 (1950); *Rosenberg* v. *United States*, 344 U.S. 889 (1952); *Sheppard* v. *Ohio*, 352 U.S. 910, 911 (1956); See also Harlan, *Manning the Dikes*, 13 Record of N.Y.C.B.A. 541, 547 (1958), Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar Ass'n. Q. 393, 402-403 (1960)).

In *Brown* v. *Allen*, 344 U.S. 443 (1953), Mr. Justice Jackson expressed some views that might make an affirmance of the Court of Appeals' decision in this case meaningful if the Court decides to so venture. Mr. Justice Jackson said:

> "My conclusion is that whether or not this Court has denied certiorari from a State court's judgment in a habeas corpus proceeding, no lower Federal court should entertain a petition except on the following conditions: (1) That the petition raises a jurisdictional question involving Federal law on which the State law allowed no access to its courts, either by habeas corpus or appeal from the conviction, and that he therefore has no state remedy; or (2) that the petition shows that although the law allows a remedy, he was actually and properly obstructed from making a record

upon which the question could be presented, so that his remedy by way of ultimate application to this Court for certiorari has been frustrated. There may be circumstances so extraordinary that I do not now think of them which would justify a departure from this rule, but the run-of-the-mill case certainly does not." (344 U.S. at 545).

Mr. Justice Jackson also stated:

"I agree that as stare decisis, denial of certiorari should be given no significance whatever. It creates no precedent and approves no statement of principle entitled to weight in any other case. But, for the same case in which certiorari is denied, its minimum meaning is that this court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of res judicata as applied either by State or Federal courts. . . ." (344 U.S. at 543).

In the course of the same decision, Mr. Justice Reed speaking for himself and Chief Justice Vinson and Justice Minton, said:

"A. *Effect of Denial of Certiorari.*—In cases such as these, a minority of this Court is of the opinion that there is no reason why a district court should not give consideration to the record of the prior certiorari in this court and such weight to our denial as the District Court feels the record justifies. This is the view of the Court of Appeals [Citations omitted.] This is, we think, the teaching of *Ex parte Hawk*, 321 U.S. 114, 118, and *White* v. *Ragen*, 324 U.S. 764, 765. We have frequently said that the denial of certiorari 'imports no expression of opinion upon the merits of a case.' [Citations omitted.] When on review of proceedings no res judicata or precedential effect follows, the result would be in accord with that expression, that statement is satisfied. But denial of certiorari marks

> final action on State criminal proceedings. In fields other than habeas corpus with its unique opportunity for repetitious litigation, as demonstrated in *Dorsey* v. *Gill*, 80 App. D.C. 9, 148 F.2d 857, See F.R.D. 313, the denial would make the issues res judicata. The minority thinks that where a record distinctly presenting a substantial Federal constitutional question disentangled from problems of procedure is brought here by certiorari and denied, courts dealing with the petitioner's future applications for habeas corpus on the same issues presented in earlier applications for writs of certiorari to this Court, should have the power to take the denial into consideration in determining their action. . . ." (344 U.S. at 456).

Thus, if this Honorable Court is to accord greater significance to certiorari by requiring the appointment of counsel to assist an indigent defendant in preparing a Petition for a Writ of Certiorari to this Court, then the denial of certiorari should have the same effect as to that particular case as would the dismissal of an appeal for want of a "substantial Federal question." (See *Epton* v. *New York*, 390 U.S. 29 (1968); *United States ex rel. Epton* v. *Nenna*, 318 F.Supp. 899, 906-909 (S.D.N.Y. 1970), aff'd 446 F.2d 363, 365, 366 (2nd Cir. 1971), cert. den. 404 U.S. 948 (1971)). Incidentally, it is interesting to note the extent to which the denial of certiorari is alluded to in citations of cases in both legal periodicals and in the opinions of this and other courts. It is also interesting to note the increasing tendency to write dissenting opinions, sometimes of considerable length, from orders of this Court denying certiorari. If the denial of certiorari is of no significance, then why should dissents be noted and why should that fact be alluded to in a case citation? (See *Simmons* v. *Union News Co.*, 382 U.S. 884, 886 (1965).)

This approach would allow for the criminal defendant to have a full and complete consideration of his case at all levels while at the same time insuring a higher degree of finality to criminal judgments (See *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 Univ. Chi. L. Rev. 142 (1970); Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451 (1966)).

CONCLUSION

For the foregoing reasons, the Commonwealth of Virginia, joined by the State of California, as amicus curiae on behalf of the petitioner herein, respectfully requests this Honorable Court to reverse the decision of the Court of Appeals and remand the case to the United States Court of Appeals for the Fourth Circuit with directions to vacate its opinion and to remand the cases to the District Courts with instruction to dismiss the petitions for writs of habeas corpus.

Respectfully submitted,

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The Commonwealth of Virginia has been authorized by the Honorable Evelle J. Younger, Attorney General of the State of California, to list him as joining with us in our Amicus Curiae brief.

CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., an Assistant Attorney General of Virginia, and a Member of the Bar of the Supreme Court of the United States, do hereby certify that on the 21st day of February, 1974, I mailed copies of the foregoing brief of Amicus Curiae in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit by first class mail to the Honorable Robert Morgan, Attorney General of North Carolina, P. O. Box 629, Raleigh, North Carolina, 27602, Counsel for Petitioners, and to Thomas B. Anderson, Jr., Esquire, Loflin, Anderson, and Loflin, 119 Orange Street, P. O. Box 1315, Durham, North Carolina 27702, of counsel for respondent.

ROBERT E. SHEPHERD, JR.
Assistant Attorney General of Virginia

INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-786

MAJ. FRANK ROSS, and
THE STATE OF NORTH CAROLINA,

Petitioners,

VS.

CLAUDE F. MOFFITT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE

CONSTITUTIONAL PROVISIONS INVOLVED

Ill. Const. Art. VI, § 4:

§ 4. Supreme Court—Jurisdiction

(a) The Supreme Court may exercise original jurisdiction in cases relating to revenue, mandamus, prohibition or habeas corpus and as may be necessary to the complete determination of any case on review.

(b) Appeals from judgments of Circuit Courts imposing a sentence of death shall be directly to the Supreme Court as a matter of right. The Supreme Court shall provide by rule for direct appeal in other cases.

(c) Appeals from the Appellate Court to the Supreme Court are a matter of right if a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court, or if a division of the Appellate Court certifies that a case decided by it involves a question of such importance that the case should be decided by the Supreme Court. The Supreme Court may provide by rule for appeals from the Appellate Court in other cases.

Ill. Const. Art. VI, § 6:

§ 6. Appellate Court—Jurisdiction

Appeals from final judgments of a Circuit Court are a matter of right to the Appellate Court in the Judicial District in which the Circuit Court is located except in cases appealable directly to the Supreme Court and except that after a trial on the merits in a criminal case, there shall be no appeal from a judgment of acquittal. The Supreme Court may provide by rule for appeals to the Appellate Court from other than final judgments of Circuit Courts. The Appellate Court may exercise original jurisdiction when neces-

sary to the complete determination of any case on review. The Appellate Court shall have such powers of direct review of administrative action as provided by law.

STATUTES INVOLVED

Ill. Rev. Stat. 1971, Ch. 110 A, § 315:

315. (Supreme Court Rule 315). Leave to Appeal From the Appellate Court to the Supreme Court

(a) Petition for Leave to Appeal: Grounds. A petition for leave to appeal to the Supreme Court from the Appellate Court may be filed in any case not appealable from the Appellate Court as a matter of right. Whether such a petition will be granted is a matter of sound judicial discretion. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.

Ill. Rev. Stat. 1971, Ch. 110 A, § 317:

317. (Supreme Court Rule 317). Appeals from the Appellate Court to the Supreme Court as of Right

Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right in cases in which a question under the constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court.

Ill. Rev. Stat. 1971, Ch. 110 A, § 603:

603. (Supreme Court Rule 603). Court to Which Appeal Is Taken

Appeals in criminal cases in which a statute of the United States or of this State has been held invalid and appeals by defendant from judgments of the circuit courts imposing sentence of death shall lie directly to the Supreme Court as a matter of right. All other appeals in criminal cases shall be taken to the Appellate Court.

INTEREST OF THE AMICUS CURIAE

The State of Illinois has a substantial interest in the requirements of counsel imposed by this Court. Procedures established in Illinois for appointment of counsel for discretionary appeals have been accepted by the Seventh Circuit Court of Appeals in *United States ex rel. Pennington* v. *Pate*, 409 F. 2d 757 (7th Cir. 1969). Similar procedures exist in the State of North Carolina and those procedures were struck down by the Fourth Circuit Court of Appeals in *Moffitt* v. *Ross*, 483 F. 2d 650 (4th Cir. 1973). Any decision by this Court which changes the appellate procedures followed in North Carolina will directly affect the procedures in Illinois. Therefore, the State of Illinois has a direct and important interest in any such decision.

I.

ILLINOIS APPELLATE PROCEDURES, SIMILAR TO THOSE OF NORTH CAROLINA, HAVE BEEN FOUND TO AFFORD INDIGENTS ADEQUATE ACCESS TO THE COURTS.

The Illinois system of appellate review is very similar to that of North Carolina. Both States have a multi-tiered appellate system with appeals from convictions involving

State or Federal Constitutional questions or of capital cases going directly to the Supreme Court of the State.[1] All other convictions are appealed, as a matter of right, to the Appellate courts.[2] In appeals taken as a matter of right, counsel is guaranteed to indigents. Illinois does not guarantee counsel in the preparation of petitions requesting discretionary appeals but once the case is taken, the reviewing court appoints counsel for preparation of the brief.

In Illinois, several alternatives are available to inmates petitioning for discretionary appeal. The most common practice is for the *pro se* petitioner to send the court a copy of his appellate court brief and a copy of the appellate court opinion. However, even a letter expressing a desire for further appeal has been sufficient to convince the court to hear the case.[3] In Cook County, Illinois, the Public Defender regards himself authorized to represent his clients, without further court appointment, on leave to appeal in the Illinois Supreme Court and petitions for certiorari in the United States Supreme Court. The decision to file the Petition is made by the Public Defender on the basis of the merits of the case. Illinois also has a

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1. Ill. Const., Art. VI, § 4; Ill. Rev. Stat. 1971, Ch. 110A, §§ 317, 603. N.C.G.S. § 7A-27(a). North Carolina also provides for review of appellate cases in which a dissenting opinion has been filed.

2. Ill. Const., Art. VI, § 6; Ill. Rev. Stat. 1971, Ch. 110A, § 315; N.C.G.S. § 7A-31.

3. For example, People v. Norbert Jones, appeal docketed, No. 45631, Ill. Supreme Court; People v. Wilford Jones, appeal docketed, No. 45633, Ill. Supreme Court.

State Appellate Defender[4] which has filed several Petitions for Leave to Appeal and will file Petitions for Certiorari in appropriate cases.

One important similarity in the procedures of Illinois and North Carolina is that, in questions involving the state or federal Constitution, appeals are taken as a matter of right.[5] The Fourth Circuit recognized this in its opinion, 483 F. 2d at 651, and yet expressed its concern that,

> in the context of constitutional questions arising from criminal prosecutions, permissive review by the state's highest court may be predictably the most meaningful review the convictions will receive. 483 F. 2d at 653.

The Court went further by acknowledging that the appeal in the case *sub judice* did not involve a constitutional question. 483 F. 2d at 651. Therefore, the Court's concern that important Constitutional questions will not be subject to review is unfounded for, by definition, such review is a matter of right in North Carolina and Illinois. Hence, the Court's holding must be interpreted only in light of appeals not involving Constitutional issues. For this reason, the court's discussion of appeal of an issue involving an indigent's Constitutional rights is not germane to the real issue, which is access to the courts.

The Seventh Circuit considered this precise question in *United States ex rel. Pennington* v. *Pate*, 409 F. 2d 757 (7th Cir., 1969) and decided that refusal to appoint counsel for discretionary appeals was not a denial of either due process or equal protection guarantees. The

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4. Ill. Rev. Stat. 1971, Ch. 38, § 208 (1972 Supp. pp. 211-12)

5. See footnote 1, *supra*.

Court recognized the alternatives to counsel in noting:

> A second reason for not imposing on the Illinois Supreme Court the duty of providing counsel for every petitioner seeking a discretionary appeal is that, if in fact a petitioner, such as Pennington, does have a meritorous constitutional claim which he has heretofore failed to assert, this claim has either been waived and so could not under any circumstances be presented to the Illinois Supreme Court on appeal or it concerns such a fundamental right that an adequate remedy still exists in the form of the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. 1967, ch. 38 § 12-1, *et seq.* 409 F. 2d at 760.

These alternatives, together with the access to the courts guaranteed to a prisoner, make the requirement of counsel an unnecessary burden on the states. By allowing the prisoner to petition for waiver of filing and transcript fees, and by notifying him of his rights on appeal, the State has sustained its burden of keeping its courts open to everyone. Illinois procedure has been found adequate to safeguard rights on appeal in that it provides that a defendant,

1. May seek leave to appeal by filing his first appeal brief along with a copy of the lower court's opinion, and,
2. be notified of the affirmation of his conviction and applicable time limits for appealing the decision.

The procedure for discretionary appeals is virtually the same in both Illinois and North Carolina. Both States allow indigents to file *in forma pauperis* and provide free transcripts. Counsel is appointed once a case is taken on and appeals involving Constitutional issues are allowed as matters of right. These procedures assure indigents of the access to the courts that is their Constitutional right.

To require more is to ignore not only the nature of discretionary appeals but also the limited resources of the states. This Court is urged to adopt the policy for discretionary appeals as set forth by the Seventh Circuit in *Pennington.*

II.

THE DIFFERENCES BETWEEN APPEALS OF RIGHT AND DISCRETIONARY APPEALS, RECOGNIZED IN OTHER DECISIONS, WAS IGNORED BY THE FOURTH CIRCUIT.

In its opinion in *Moffitt,* the Fourth Circuit held that it could discern no differences between appeals of right and those which are granted only through the discretion of reviewing courts. However, such a distinction has been an important factor in the decisions of the other courts that have considered this issue. This Court, in *Douglas* v. *California,* 372 U.S. 303 (1963), considered the issue of an indigent's right to counsel on his appeal of right. The Court specifically differentiated between appeals of right and discretionary appeals when it said:

> We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeal had sustained his conviction, on whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by Appeal as of right of by petition for a writ of certiorari which lies within the Court's discretion. But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not count to a denial of due process or an "invidious discrimination." 372 U.S. at 356 (citations omitted)

The Court (Douglas, J.) went on to explain that the law need not attempt to eradicate all differences between people:

> Absolute equality is not required; lines can be and are drawn and we often sustain them. But where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor. 372 U.S. at 356 (citations omitted)

Thus, this Court found an obvious and important distinction between appeals of right and discretionary appeals.

The Seventh Circuit Court of Appeals also decided this issue in *United States ex rel. Pennington* v. *Pate*, 409 F. 2d 757 (7th Cir. 1969), by placing emphasis on the different types of appeals. Referring to the quote from *Douglas, supra*, the Seventh Circuit specifically refused to extend the right to counsel to the second discretionary stage of appeal. 409 F. 2d at 760.

Both *Douglas* and *Pennington* recognized the issue involved in discretionary appeals to be that of free and equal access to the courts. By allowing indigents to proceed *in forma pauperis*, by allowing free transcripts to those unable to afford them, and by appointing attorneys once the case has been taken on, the Courts have insured that every person has the same right of access to the courts. While the Fourth Circuit correctly perceives the issue involved to be access to the courts, its decision fails to recognize that the right to counsel is not always a concomitant to the right of access to the courts. Illustrative of the Court's failure to perceive the issue is the fact that the decision in *Moffitt* was specifically confined to criminal appeals. The Court said:

> Finally, we may emphasize that we are dealing with the rights of defendants in criminal cases. Nothing which we have said should be taken as having any application in any collateral, civil proceeding, though it may call into question the validity of a previous criminal conviction. 483 F. 2d at 656.

In so holding, the Fourth Circuit has apparently determined that it is better policy to provide counsel to pursue the long odds for a discretionary appeal, than to appoint counsel in civil proceedings involving the validity of a state conviction such as a federal habeas corpus action. Similarly, a prisoner who is being subjected to cruel and unusual punishment would not be allowed counsel in a civil rights action by the decision in *Moffitt*.

By failing to recognize the difference between appeals of right and discretionary appeals, and by specifically refusing to acknowledge the importance of counsel at collateral, civil proceedings, the Fourth Circuit has placed inordinate emphasis on the importance of counsel in the preparation of petitions for discretionary appeals. Yet, after emphasizing the role of counsel in such cases, the Fourth Circuit seems to contradict itself by observing:

> Yet is it a relatively minor burden we would impose on the Bar by this decision. Once a lawyer has handled one appeal, and is thoroughly familiar with the case, the issues, and the authorities, it is a relatively simple and easy task for him to prepare and file a petition for further discretionary review in a higher appellate court. That is all that is involved in these cases, for the prevailing practice of second tier appellate courts, having a discretionary jurisdiction, has been to appoint counsel for indigents once certiorari has been granted. 483 F. 2d at 655.

With this, the Court has implied that very little more than a reiteration of the appellate arguments is required. This

being true, submission of the appellate court brief, which was prepared by counsel, and the appellate court's opinion should be sufficient, even by the Fourth Circuit's standards, to apprise the higher reviewing court of the issues involved. Since the issues on discretionary appeals are, by definition, not of Constitutional dimensions, such a system as is found in Illinois and described herein, must be deemed adequate to allow indigents equal access to the courts.

III.

THE FOURTH CIRCUIT'S DECISION IMPOSES TOO GREAT A BURDEN UPON THE STATES' JUDICIAL SYSTEMS AND RESOURCES.

The *Moffitt* decision tended to minimize the burden that its holding would place on the individual states. However, in both *Douglas* and *Pennington*, the courts recognized that realistic limits must be placed on the judicial system. In *Pennington*, the Seventh Circuit noted:

> A further reason for not placing the burden on the Illinois court system of providing counsel to appellants, such as the petitioner, is our recognition of the practical problems which would be involved in the implementation of such a right. We are not unmindful of Illinois' experience in implementing the right-to-counsel requirements of *Gideon* and *Douglas*. Institutional limitations are also important considerations. We think that the distincton between equality of access to the courts as required in *Griffin* and *Burns* and the right to appointment of counsel is meaningful. This distinction has the practical merit that the states are institutionally better prepared to waive fees and costs for the poor than they are to provide free counsel. 409 F. 2d at 760.

In so holding, the Seventh Circuit recognized that because the issue involved access to the courts, waiving fees for indigents is adequate to insure such access.

The *Moffitt* case imposes an intolerable burden on the states with seeming disregard for the limitations of the system. Not only would states be required, under *Moffitt* to pay for attorneys in appeals to state courts, but also for appeals to the United States Supreme Court. This position is untenable. If Federal courts desire counsel appointed for litigation in federal courts, then clearly the burden is upon the federal government and not the several states, to provide for it. Such a holding results in the State always required to pay the attorney's fees of the defendant. While courts may order one party to pay another's fees, such powers should be exercised on a case-by-case basis and then only quite sparingly.

The burden being imposed becomes even more obvious in light of comments by Mr. Justice Clark, dissenting in *Douglas:*

> We all know that the overwhelming percentage of *in forma pauperis* appeals are frivolous. Statistics of this Court show that over 96% of the petiitons filed here are of this variety.[6] 372 U.S. at 358.

Imposition upon the states of the onus paying for appeals that are overwhelmingly shown to be frivolous and not of a Constitutional nature is clearly not an acceptable result. Certainly even Judge Haynsworth, who spoke for the court in *Moffitt,* would not concede that the courts

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6. Statistics from the office of the Clerk of this Court reveal that in the 1961 Term only 38 of 1,093 *in forma pauperis* petitions for certiorari were granted (3.4%). Of 44 *in forma pauperis* appeals, all but one were summarily dismissed (2.3%). (Court's footnote)

have sufficient resources to handle their existing case load.

Even if there had been an increase in legal resources of which the Court spoke, 485 F. 2 at 655, there has been no weighing by the Court of how these resources are to be allocated. As discussed in Part Two of this brief, the Fourth Circuit has made no allowance for habeas corpus actions or civil rights complaints in its decision. Certainly, the allocation of the resources to these areas must at least be considered. In choosing to disregard the burden imposed on the judicial system by its decision, and in failing to consider alternative methods of allocating the resources now existing, the Fourth Circuit erred and the State of Illinois, as *amicus curiae,* urges this Court to adopt the rule for counsel on discretionary appeals as set forth in *Pennington.*

CONCLUSION

The procedures established in Illinois and North Carolina are consistent with Constitutional requirements and afford indigents equal access to the courts. To change them as suggested by *Moffitt* v. *Ross* would be to impose an intolerable and unnecessary burden on the states while serving to only marginally increase an indigent's chances of convincing a Court to review his conviction. Therefore, the People of the State of Illinois urge this Court to reject the Fourth Circuit's decision and, instead, adopt the approach of the Seventh Circuit Court of Appeals in *United States ex rel. Pennington* v. *Pate.*

Respectfully submitted,

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The following States, by their respective Attorneys General, wish to join in the views expressed herein:

STATE	ATTORNEY GENERAL
Alabama	William J. Baxley
Arizona	Gary K. Nelson
Delaware	W. Laird Stabler, Jr.
Iowa	Richard C. Turner
Kentucky	Ed W. Hancock
Maine	Jon A. Lund
Michigan	Frank J. Kelley
Montana	Robert L. Woodahl
Nebraska	Clarence A. H. Meyer
Nevada	Robert List
New Mexico	David L. Norvell
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South Carolina	Daniel R. McLeod
Utah	Vernon B. Romney
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West Virginia	Chauncey H. Browning, Jr.
Wyoming	Clarence A. Brimmer

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In The

Supreme Court of the United States

October Term, 1973

No. 73-786

MAJOR FRED R. ROSS and
STATE OF NORTH CAROLINA,

Petitioners

v

CLAUDE FRANKLIN MOFFITT,

Respondent

MAJOR FRED R. ROSS and
STATE OF NORTH CAROLINA,

Petitioners

v

CLAUDE F. MOFFITT,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported as MOFFITT v. ROSS, 483 F. 2d 650 (4th Cir. 1973).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). The Petition for a Writ of Certiorari was granted on January 7, 1974.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

QUESTION PRESENTED

WHETHER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE THE APPOINTMENT OF COUNSEL TO REPRESENT AN INDIGENT DEFENDANT SEEKING DISCRETIONARY REVIEW OF CONVICTIONS AFFIRMED ON APPEALS WHICH WERE TAKEN AS OF RIGHT.

STATEMENT OF THE CASE

No. 72-2480
(Mecklenburg County Conviction)

At the May 11, 1970 Schedule "B" Criminal Session of the Mecklenburg County (North Carolina) Superior Court, Moffitt, while represented by William D. McNaull, Jr., Esquire, court-appointed counsel[1], was convicted of forgery and uttering a forged instrument. On appeal to the North Carolina Court of Appeals[2], while still represented by William D. McNaull, Jr., Esquire, court-appointed counsel, Moffitt's conviction was affirmed on November 18, 1970. STATE v. MOFFITT, 9 N.C. App. 694, 177 S.E. 2d 234 (1970). In a letter to Moffitt, Mr. McNaull stated that he had "approached" the Superior Court for appointment to appeal "from the North Carolina Court of

1. N.C.G.S. 7A-451 reads in relevant part:
"(a) An indigent person is entitled to services of counsel on the following actions and proceedings:
"(1) Any felony case . . ."

2. N.C.G.S. 7A-27 reads in relevant part:
"Appeals of right from the courts of the trial divisions. —
"(b) From any final judgment of a superior court, other than one described in (a) of this section, or one entered in a post-conviction hearing under Article 22 of Chapter 15, including any final judgment entered upon review of a decision of an administrative agency, *appeal lies of right to the Court of Appeals.*" (Emphasis added.)

Appeals to the Supreme Court of North Carolina." In his letter[3], Mr. McNaull suggested that Moffitt —

> ". . . immediately proceed with filing your petitions for habeas corpus in the Federal Court. You might also file one in the Mecklenburg Superior Court alleging the State must appoint a lawyer for you to take your appeal from the Court of Appeals to the Supreme Court.
>
> "I would ordinarily be happy to prepare these petitions for writs for you, however, I will await hearing from you . . ."

On December 11, 1970, Moffitt filed an extensive Petition for post conviction review pursuant to N.C.G.S. 15-217, et seq., *Review of Criminal Trials*, in the Mecklenburg County Superior Court contending that the indictment on which he was tried was invalid. This Petition was denied by Order filed December 17, 1970. Moffitt then filed a "Petition for Appointment of Counsel" in the United States District Court which was denied by Order dated February 9, 1971. On February 26, 1971, Moffitt then filed an Application for Writ of Habeas Corpus. MOFFITT v. ROSS, Civil No. 2842—Charlotte (W. D.N.C.). By Order filed September 17, 1971, habeas relief was denied and Moffitt appealed. The appeal to the Fourth Circuit Court of Appeals was dismissed by Stipulation so that Moffitt could exhaust state court remedies. On April 25, 1972, Moffitt filed his third Petition for post conviction review. In the first he alleged that the Bill of Indictment upon which he was tried was fatally defective, a contention which he had unsuccessfully argued upon his appeal to the North Carolina Court of Appeals. In the second, which was denied by Order of the Mecklenburg

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3. See p. 36A, Appendix to Moffitt's Brief filed in the Fourth Circuit Court of Appeals. The letter is of further interest, since in it counsel advises Moffitt that in light of the affirmance of his conviction, counsel had "conferred with the Solicitor of Mecklenburg County and I was successful in getting *all charges against you dropped*. Hence, the only charges pending against you at the present time are the convictions for which you are now serving time." (Emphasis in original.)

County Superior Court on November 26, 1971, he alleged that his constitutional rights were violated because the North Carolina Court of Appeals, in accordance with its rules, heard and decided his case upon a narrative of the testimony at the trial instead of the trial transcript itself.[4] In the third Petition filed April 25, 1972, he alleged that his statutory and constitutional rights were violated because the trial court refused to appoint counsel to seek a Petition for Writ of Certiorari on his behalf from the Supreme Court of North Carolina after the North Carolina Court of Appeals had affirmed his conviction. By Order dated April 28, 1972, the Petition filed April 25, 1972 was denied. Moffitt then sought certiorari from the North Carolina Court of Appeals to review the Order of April 28, 1972, and by Order dated May 2, 1972, Hugh B. Campbell, Jr., Esquire, was court-appointed to represent Moffitt in seeking certiorari in the North Carolina Court of Appeals.[5] On June 26, 1972, Moffitt's court-appointed counsel filed a Petition for Writ of Certiorari which was denied by the North Carolina Court of Appeals in Conference by Order dated July 17, 1972. MOFFITT v. STATE, No. 72SC215PC. On August 25, 1972, Moffitt once again filed an Application for Writ of Habeas Corpus which was denied by Order of the District Court on November 29, 1972. MOFFITT v. ROSS, Civil No. C-C-72-193 (W.D.N.C.). (A. p. 9). From the denial of all but one claim by the District Court, Moffitt appealed to the Fourth Circuit Court of Appeals which held that ". . . The

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4. Rule 19(d), Court of Appeals Rules, Replacement Vol. 4A of the General Statutes of North Carolina.

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5. N.C.G.S. 7A-451 reads in pertinent part:
"(a) An indigent person is entitled to services of counsel in the following actions and proceedings:
"(3) A post-conviction proceeding under Chapter 15 of the General Statutes."

* * *

N.C.G.S. 15-222 reads in relevant part:
"Review by application for certiorari.—Any final judgment entered upon such a petition and proceeding may be reviewed by the Court of Appeals of North Carolina upon application by the petitioner or by the State for writ of certiorari brought within 60 days from the entry of the judgment in such proceeding."

same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals."

No. 72-1720
(Guilford County Conviction)

At the October 30, 1970 Criminal Session of the Guilford County (North Carolina) Superior Court, Claude Franklin Moffitt, while represented by R. D. Douglas, III, Esquire, Assistant Public Defender of the Eighteenth Judicial District of the State of North Carolina[6], was tried and convicted of forgery and uttering a forged instrument.

On appeal as of right to the North Carolina Court of Appeals[7] while still represented by Assistant Public Defender Douglas, the conviction was affirmed, STATE v. MOFFITT, 11 N.C. App. 337, 181 S.E. 2d 184 (1971), and the Supreme Court of North Carolina denied a Petition for Writ of Certiorari filed on Moffitt's behalf by the Public Defender.[8] STATE v. MOFFITT, 279 N.C. 396, 183 S.E. 2d 247 (1971).

On December 10, 1971, Moffitt filed a paperwriting dated December 8, 1971, which he entitled "Motion for Employment

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6. See n. 1, supra. See, also, Article 37 of Chapter 7A of the General Statutes of North Carolina, N.C.G.S. 7A-465, et seq., *The Public Defender*.

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7. See n. 2, supra.

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8. N.C.G.S. 7A-30 reads in relevant part:

"Appeals of right from certain decisions of the Court of Appeals.—Except as provided in § 7A-28, from any decision of the Court of Appeals rendered in a case

"(1) Which directly involves a substantial question arising under the Constitution of the United States or of this State, or

"(2) In which there is a dissent . . ."

* * *

In STATE v. MOFFITT, 279 N.C. 396, 183 S.E. 2d 247 (1971), the Supreme Court of North Carolina dismissed the appeal. "For lack of a substantial constitutional question"

of Counsel" "to seek an appeal in the federal courts."[9] On January 25, 1972, Moffitt filed a Petition for post conviction review alleging the denial of counsel to perfect an appeal to the Supreme Court of the United States. This Petition was denied by Order filed February 25, 1972. After denial of the Petition, Moffitt then filed a Petition for Writ of Certiorari in the North Carolina Court of Appeals on March 10, 1972, in which he contended that the refusal of the court to appoint counsel denied him "access to the Court of Appeals for the United States." This Petition for Writ of Certiorari was denied by the North Carolina Court of Appeals in Conference on March 27, 1972. Moffitt then filed an Application for Federal Habeas Corpus on April 11, 1972, which was denied on May 19, 1972. MOFFITT v. ROSS, No. C-101-G-72 (M.D.N.C., May 19, 1972) (A. p. 7). Upon Moffitt's appeal to the United States Court of Appeals for the Fourth Circuit, it was held that he had a ". . . right to assistance of counsel in seeking access to the Supreme Court of the United States . . ." and the District Court was directed, upon remand, to ". . . appraise the substantiality of the federal claim . . ." in circumstances ". . . where the only remedy available to the District Court would be the prisoner's release on a writ of habeas corpus . . ." MOFFITT v. ROSS, 483 F. 2d 650, 655 (4th Cir. 1973).

ARGUMENT

I

AN INDIGENT DEFENDANT IS NOT ENTITLED AS A MATTER OF CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF COUNSEL TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA FROM THE NORTH CAROLINA COURT OF APPEALS.

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9. By letter dated December 14, 1971, the Honorable Charles T. Kivett, Resident Judge of the Guilford County Superior Court, advised Moffitt that "this Court does not have jurisdiction to appoint you an attorney to represent you in a further hearing in the federal court. I would advise you to contact the Middle District Court here in Greensboro and ask appointment of counsel through that Court."

The appellate court system of the State of North Carolina is the Appellate Division of the General Court of Justice which consists of the Supreme Court and the Court of Appeals.[10] The Supreme Court of North Carolina has original appellate jurisdiction in any criminal matter in which the defendant has been sentenced to death or life imprisonment.[11] All other criminal appeals are taken of right from the Superior Courts of North Carolina to the Court of Appeals.[12] An appeal of right exists from the Court of Appeals to the Supreme Court of North Carolina only when it "involves a substantial question arising under the Constitution of the United States or of this State" or when "there is a dissent."[13] All other cases are subject to discretionary review by the Supreme Court of North Carolina.[14]

Moffitt had court-appointed counsel at his trials in the Mecklenburg and Guilford County Superior Courts, and in each instance counsel was reappointed upon Moffitt's appeals to the North Carolina Court of Appeals, thereby fully satisfying the requirements of DOUGLAS v. CALIFORNIA, 372 U.S. 353 (1963). In DOUGLAS this Court only went so far as to say that an indigent defendant is entitled to counsel where an

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10. N.C.G.S. 7A-5.

11. N.C.G.S. 7A-27(a).

12. N.C.G.S. 7A-27(b); n. 2, supra.

13. N.C.G.S. 7A-30; n. 8, supra.

14. N.C.G.S. 7A-31 provides in pertinent part:

"(c) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court after determination of the cause by the Court of Appeals when in the opinion of the Supreme Court

"(1) The subject matter of the appeal has significant public interest, or

"(2) The cause involves legal principles of major significance to the jurisprudence of the state, or

"(3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court."

appeal in a criminal case is a matter of right. As Mr. Justice Douglas stated in delivering the opinion of this Court:

> "We are not here concerned with problems that might arise on the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. *We are dealing only with a first appeal, granted as a matter of right to rich and poor alike . . . from a criminal conviction.* We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeals had sustained his conviction . . . or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by appeal as of right or by petition for writ of certiorari which lies within the Court's discretion. But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination.' . . . Absolute equality is not required; lines can be and are drawn and we often sustain them . . . But where the merits of *the one and only appeal* an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." (Emphasis added.) DOUGLAS v. CALIFORNIA, supra, at 356, 357.

Where, as in North Carolina, further appellate review by the Supreme Court of North Carolina of the decisions of the North Carolina Court of Appeals is discretionary, there is not, as yet, a constitutional right to appeal. Moreover, application of the standards regulating discretionary review by the Supreme Court of North Carolina clearly demonstrate that Moffitt's Petition for Certiorari in the Mecklenburg County case would

have almost certainly been denied.[15] The only appeals of right to the Supreme Court of North Carolina are those specified in N.C.G.S. 7A-30.[16] All other review is discretionary. Therefore, since the Writ of Certiorari in the Supreme Court of North Carolina is a form of discretionary review, had after appeal as of right to the North Carolina Court of Appeals, there is no constitutional right to counsel to seek discretionary review from the Supreme Court of North Carolina.

In reliance upon principles which it found implicit in DOUGLAS, ". . . to require the result we reach . . .", the Fourth Circuit Court of Appeals extended the constitutional right to counsel beyond the appeal of right, to ". . . require counsel in other and subsequent discretionary appeals." 483 F. 2d at 655. While acknowledging that "Two Courts of Appeals have held that the questions reserved in DOUGLAS should be answered in the negative . . .", the Fourth Circuit ". . . notice[d] the possible impact of changing times . . ." and based its newly announced constitutional principle upon the assertion that ". . . As our resources grow, there is a correlative growth in our ability to implement basic notions of fairness. . . ." Therefore, the Fourth Circuit Court of Appeals found implicit in DOUGLAS, which now requires counsel in the first appeal of right, to also ". . . require counsel in other and subsequent discretionary appeals."

In its conclusion that the appointment of counsel is constitutionally required in discretionary review, the Circuit Court departed from the rationale upon which the constitutional

15. In STATE v. MOFFITT, 9 N.C. App. 694, 177 S.E. 2d 234 (1970), Moffitt assigned as error that (1) the Bill of Indictment upon which he was tried was defective; that (2) testimony concerning possession of a checkwriting machine was improperly admitted into evidence; that (3) the checkwriting machine was improperly admitted in evidence; and that (4) the forged instrument was improperly admitted into evidence. He also assigned as error a portion of the trial court's charge to the jury and the court's failure to grant his motions for nonsuit.

16. See n. 8, supra.

imperative for the appointment of counsel is based. As Mr. Justice Stewart explained in KIRBY v. ILLINOIS, 406 U.S. 682, 690:

> "The rationale of those cases was that an accused is entitled to counsel at any 'critical stage of the prosecution.'"

In KIRBY this Court held that the appointment of counsel is not required at a pre-indictment lineup, finding that the pre-indictment lineup is not a "critical stage." Similarly, in SIMMONS v. UNITED STATES, 390 U.S. 377 (1968), this Court held that there is no constitutional requirement of counsel at a photographic lineup, again holding that this is not a "critical stage of the prosecution." Therefore, before the accused is entitled to counsel, it must be a "critical stage of the prosecution." By requiring the appointment of counsel "in other and subsequent discretionary appeals", the Fourth Circuit Court of Appeals declared *sub silentio* that certiorari review is a "critical stage of the prosecution." However, certiorari review is obviously not a "critical stage of the prosecution", since discretionary review certainly cannot be encompassed within the "critical stage" concept. Without a "critical stage" foundation, the underpinnings of the right to counsel collapses.

When the identical contention was presented to the Seventh Circuit Court of Appeals in PENNINGTON v. PATE, 409 F. 2d 757 (7th Cir. 1969), cert. denied, 396 U.S. 1042 (1970), it was held that the State of Illinois had fully discharged its constitutional obligations by providing assigned counsel for an indigent's appeal to the intermediate appellate court and it was not required to provide counsel to assist the indigent as he sought access to the Supreme Court of Illinois.

II.

AN INDIGENT DEFENDANT IS NOT ENTITLED AS A MATTER OF CONSTITUTIONAL RIGHT TO

THE ASSISTANCE OF COUNSEL TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE SUPREME COURT OF NORTH CAROLINA.

Since Moffitt was provided legal counsel at his trials and upon his appeals to the North Carolina Court of Appeals, the requirement set forth in DOUGLAS was fully satisfied. The provision for counsel for an indigent defendant seeking a writ of certiorari from this Honorable Court is not required by any decision of this Court. BRIDWELL v. COINER, 322 F. Supp. 59 (N.D. W.Va. 1971).

In PENNINGTON v. PATE, supra, the Seventh Circuit Court of Appeals was also presented with this contention. In denying relief, the Circuit Court noted that, ". . . If we were to hold for the Petitioner here, we would be saying a fortiori that the Supreme Court's present practice of not granting counsel for the purpose of preparing certiorari petitions is contrary to equal protection under the Constitution. This we are unwilling to do." PENNINGTON v. PATE, supra, at 760.

In a similar finding the Tenth Circuit Court of Appeals held in PETERS v. COX, 341 F. 2d 575 (10th Cir. 1965), that New Mexico had no obligation to provide an indigent defendant with the assistance of counsel to prepare and file a Petition for Writ of Certiorari in this Honorable Court to the Supreme Court of New Mexico. In PETERS, a per curiam decision, the Court stated:

> "It is, of course, the law that the due process clause of the Fourteenth Amendment to the Constitution requires the appointment of counsel to represent an indigent defendant in a state criminal trial . . . It is also the law that under the due process and equal protection clauses of the Fourteenth Amendment, an indigent defendant has the right to appointed counsel on appeal of a state criminal convic-

> tion . . . But, we have been cited to no authority requiring, or even permitting, a state supreme court to appoint counsel for an indigent defendant to represent him on his appeal to the Supreme Court of the United States. Our own research has revealed none . . ."

This Court's certiorari practice has been described in STERN & GRESSMAN, *Supreme Court Practice* (4th Ed. 1969), as follows:

> "*No appointment of counsel before grant of review.* The Court has steadfastly refused to appoint counsel to assist an unrepresented indigent, prior to the grant of review, in preparing a petition for certiorari or jurisdictional statement or any other preliminary motion or document. Requests for counsel at such early stages have uniformly been rejected through the Clerk, acting on instructions from the Court. While the correctness and indeed the constitutionality of this refusal to appoint counsel to prepare the documents at this critical stage of Supreme Court litigation has been questioned at least with respect to the direct review of criminal prosecutions, there is no indication as yet that the Court will change its policy in this respect." (Id. at 378; fn. omitted.)

Having concluded that both PENNINGTON and PETERS are outdated within the context of what is now "constitutionally requisite", the Fourth Circuit held that there is also a ". . . right to assistance of counsel in seeking access to the Supreme Court of the United States . . ." 483 F. 2d at 655. Once again, it must follow that the Circuit Court *sub silentio* held that a petition for certiorari to this Honorable Court is a "critical stage of the prosecution", even though, in the Guilford County case, No. 72-2480, Moffitt was represented by the Public Defender at his trial, upon his appeal as of right to the North Carolina Court of Appeals[17], as well as upon his Petition for

17. STATE v. MOFFITT, 11 N.C. App. 337, 181 S.E. 2d 184 (1971).

Writ of Certiorari to the Supreme Court of North Carolina.[18] Yet nowhere in the caselaw has discretionary review by petition for writ of certiorari ever been characterized as a "critical stage of the prosecution."

III.

THE DECISION BELOW RAISES SERIOUS PROBLEMS AFFECTING THE STRUCTURE OF CRIMINAL JUSTICE.

The Fourth Circuit's Opinion erroneously interprets this Court's opinion in DOUGLAS, supra, "... to require the result we reach ..." and therefore the Court below found that "... the only remedy available to the District Court would be the Petitioner's release on a writ of habeas corpus ..." 483 F. 2d at 655.

Moffitt, together with the vast majority of all inmates serving State Court sentences, have been provided with court-appointed counsel at every stage of the proceeding at which counsel is constitutionally required under either GIDEON v. WAINWRIGHT, 372 U.S. 335 (1963), or DOUGLAS v. CALIFORNIA, supra. The decision of the Fourth Circuit Court of Appeals in MOFFITT established a constitutional right to court-appointed counsel for indigent defendants in situations in which this Court, and all other courts considering the issue, have found no such right to exist. Moffitt was provided with counsel at every stage of the proceedings at which the developed caselaw required the appointment of counsel. We are now confronted with a landmark holding going well beyond the requirement of counsel for critical stages or the appeal as of right, to the level of discretionary review applicable to multi-tiered appellate systems, in which the second review is discretionary and sought by petition for writ of certiorari. Going

18. STATE v. MOFFITT, 279 N.C. 396, 183 S.E. 2d 247 (1971).

beyond the second tier in a multi-tiered jurisdiction, or beyond the appeal as of right in a single-tiered system, the Fourth Circuit Court of Appeals announced in MOFFITT a new constitutional principle, i.e., the constitutional right to counsel of an indigent defendant seeking discretionary review from this Honorable Court by writ of certiorari from the highest court of a state, or by analogy, from a federal conviction upheld by a circuit court. And, according to the Circuit Court, if counsel has not been appointed to seek the discretionary review, the indigent defendant's rights have been violated and he is entitled to a writ of habeas corpus. The impact of this decision is obvious upon both state and federal court convictions, since this Honorable Court has never suggested a holding as sweeping in its scope as the Fourth Circuit's holding in this case—in fact, all opinions of this Court and of all other circuits considering this contention support a conclusion contrary to that reached by the Fourth Circuit.

North Carolina does not automatically appoint counsel as a matter of right to petition the Supreme Court of North Carolina after the North Carolina Court of Appeals has affirmed a criminal conviction.[19] The inmate may request the appointment of counsel to petition the Supreme Court for a writ of certiorari, he may file a pro se petition, or he may file a fill in the blanks petition on a printed certiorari form currently utilized by the inmates of the North Carolina Department of Correction.[20] The Public Defenders in the three experimental

19. For example, according to data supplied by the Clerk of the North Carolina Court of Appeals, in 1971 that Court heard and determined 333 criminal appeals; 413 in 1972 and 418 in 1973.

20. For example, according to data supplied by the Clerk of the Supreme Court of North Carolina, in 1971 there were 73 Petitions for Writs of Certiorari in criminal cases, of which 47, or 64.4%, were indigent; in 1972 there were 153 Petitions for Writs of Certiorari in criminal cases, of which 99 were indigent cases; and in 1973 there were 149 Petitions for Writs of Certiorari in criminal cases, of which 100 were filed in indigent cases. Of the 132 Opinions filed in 1971 by the Supreme Court of North Carolina in criminal cases, 105 or 79.9% were indigent cases. In 1972, 82, or 80% of the 102 criminal cases in which opinions were filed by the Supreme Court of North Carolina, were indigent cases. In 1973, 70 out of the 95 cases in which written opinions were filed, were indigent cases.

North Carolina counties in which Public Defender Systems have been established regard themselves as authorized to represent their clients without further court appointment on petitions for certiorari to the Supreme Court of North Carolina and to this Honorable Court. However, the Public Defender makes the determination whether to file for discretionary review based on his opinion of the merits. As a matter of practice, the Public Defender will not file a petition he regards as pointless solely because his client has requested it.

The Circuit Court's opinion in MOFFITT is contrary to PENNINGTON, a decision of the Seventh Circuit Court of Appeals issued not in the dark ages as the Fourth Circuit implies, but in 1969. The assumption that legal counsel can now be required on discretionary appeal because of increased legal resources (483 F. 2d at 655) is unsupported by any statistical justification. There has not been an enormous growth in legal resources and undoubtedly the Circuit Court would concede that the Federal Courts themselves, including this Honorable Court, lack sufficient legal resources to handle their existing caseload.

The decision of the Fourth Circuit rests analytically upon the premise that every accused must have an attorney on every occasion that a wealthy man might hire one. This principle may be desirable in the abstract, but it carries too far, not only to habeas corpus and to all civil suits, but to real estate closings as well.

The Fourth Circuit states:

> ". . . in the context of constitutional questions arising in criminal prosecutions, permissive review in the state's highest court may be predictably the most meaningful review the conviction will receive." 483 F. 2d at 653.

It is clear that at least in North Carolina that review of

constitutional claims is clearly within the power of the Supreme Court of North Carolina which repeatedly resolves such questions.

The Fourth Circuit asserts that:

> "... A defendant with adequate resources to engage counsel has a meaningful right to seek access to the state's highest court. An indigent should be afforded counsel to give him a comparably meaningful right. Deprived of it, it is of little comfort to him that he was afforded legal guidance in an appeal to a subordinate court. Denied the assistance of a competent lawyer, the quality of justice for the indigent has been substantially impaired in comparison with the quality of justice afforded his more affluent brothers." 483 F. 2d at 653.

Yet, this assertion fails to support the Court's later statement that:

> "... [I]t is a relatively minor burden we would impose on the Bar by this decision. Once a lawyer has handled one appeal, and is thoroughly familiar with the case, the issues, and the authorities, it is a relatively simple and easy task for him to prepare and file a petition for further discretionary review in a higher appellate court. That is all that is involved in these cases, for the prevailing practice of second tier appellate courts, having a discretionary jurisdiction, has been to appoint counsel for indigents once certiorari has been granted." 483 F. 2d at 655.

If all that is required is a rehash of appellate court arguments, then the litigant may simply adopt his prior brief. Accepting the premise of the opinion, the most that can be required of a state is that (1) it allow a prisoner to seek leave to appeal by filing his first appeal brief along with a copy of the lower court's opinion and (2) that the defendant whose

conviction is affirmed be notified of this fact and of applicable time limits.

Finally, the requirement that the state pay the cost of counsel on certiorari to this Honorable Court is totally without precedent. If the federal courts desire that counsel be appointed for litigation in the federal courts, then this is the obligation of the federal government. There are situations in which courts may order one party to pay the other party's attorneys fees, but such powers are exercised on an *ad hoc* basis, and then quite sparingly. There is no other example in federal practice in which an entire class of litigants is entitled in all cases to attorneys regardless of the merits of their claims and the conduct of the opposing party.

CONCLUSION

The decision of the Fourth Circuit Court of Appeals in this case extends well beyond any announced intent of this Court. It holds the promise of converting multi-tiered appellate systems, designed to alleviate court congestion, into mere stepping stones from the lower state appellate courts to the highest, and from the highest state courts to this Court, which ultimately would be required to review every conviction affirmed in the state appellate courts.

The decision of the Fourth Circuit in the application of the DOUGLAS doctrine in this case extends well beyond the intent of this Court. It is clear that this Court's holding in DOUGLAS did not envision the conclusion reached in the case at Bar. The right to counsel to seek discretionary review is not the situation to which the holding in DOUGLAS applies.

For the foregoing reasons, we respectfully submit that this case should be reversed and remanded to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-786

MAJOR FRED R. ROSS AND STATE OF NORTH CAROLINA,

Appellant,

vs.

CLAUDE FRANKLIN MOFFITT,

Appellee.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

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On Writ Of Certiorari To The United States Court
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BRIEF OF THE
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association is an organization composed of over 1,000 legal services and defender offices in the United States. Founded in 1911, it includes over 4,000 individual and professional members whose main concern is the extension of quality legal services to the poor.

NLADA is alarmed at the prospect that, at this late day, the right of the poor to have equal access to the Courts of our land along with the rich is being challenged. NLADA, which has filed Amicus Briefs to this honorable Court in the cases of *In re Gault, Argersinger* v. *Hamlin, Mempha* v. *Rhay,* and others dealing with the issues of right to counsel and access to the Courts for the indigent defendant, takes the position that the poor as well as the rich shall be able to file writs in the High Courts of our land.

This Brief is filed pursuant to Supreme Court Rule 42(2). The written consent of counsel for the parties has been obtained and is attached hereto.

OPINION BELOW

The decision of the Court of Appeals for the 4th Circuit is reported at 483 F. 2nd 650 (4th Cir. 1973).

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

A petition for writ of certiorari was filed in this Court on November 15, 1973, and was granted on January 7, 1974.

QUESTION PRESENTED

Whether the Sixth Amendment and the due process and equal protection clauses of the Fourteenth Amendment require the State of North Carolina to furnish assistance of counsel to indigent defendants to petition the Supreme Court of North Carolina for a writ of certiorari to review a decision of the North Carolina Court of Appeals, and to petition the United States Supreme Court for a writ of certiorari to review a decision of the North Carolina Supreme Court.

STATEMENT OF THE CASE

Amicus adopts petitioner's statement of the case.

ARGUMENT

I.

FAILURE TO APPOINT COUNSEL FOR AN INDIGENT WHO SEEKS REVIEW TO THE STATE SUPREME COURT OR THE UNITED STATES SUPREME COURT WOULD CONSTITUTE A DENIAL OF EQUAL PROTECTION OF THE LAWS, DUE PROCESS, AND THE RIGHT TO COUNSEL GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In his dissenting opinion in *Douglas* v. *California*, Justice Harlan pointed out that,

> "Surely, it cannot be contended that the requirements of fair procedure are exhausted once an indigent has been given one appellate review." 372 U.S. at 366 (1963)

That is the issue at bar today. In *Douglas* v. *California*, supra, the issue before the Court involved a case where an indigent defendant was denied counsel at his first appeal. In the instant case, an indigent is denied counsel to proceed beyond that first appeal and is effectively denied access to the State Supreme Court and the United States Supreme Court on petition for certiorari. That precise issue with respect to appointment of counsel in a state Supreme Court was recently considered by the Sixth Circuit in *Mitchell* v. *Warden*, No. 72-1481, decided December, 1973.

In that case the Michigan Supreme Court had failed to appoint counsel for an indigent convicted of robbery who sought to file an application for leave to appeal to

the Michigan Supreme Court after his conviction was affirmed by the Michigan Court of Appeals. The Sixth Circuit held that the "Constitutional principles enunciated in *Griffin*, *Burns*, and *Douglas* require appointment of counsel to assist indigent appellants in applications to the Michigan Supreme Court for discretionary review."

The Court in *Mitchell* v. *Warden* first analyzed this Honorable Court's holding in *Douglas* v. *California*, supra. While recognizing that, limited to its facts, *Douglas* provided only that counsel be appointed for appeals as a matter of right, the Sixth Circuit went on to examine the underlying principle behind the decision. It focused on that portion of the opinion in *Douglas* which pointed out that the invidious discrimination complained of at bar was not between good cases and bad cases, but between rich defendants and poor ones.

> "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf . . ." *Douglas* v. *California*, supra.

The Sixth Circuit then pointed out that the disadvantage to an accused in a discretionary appeal is no less substantial.

> "The assistance of a skilled advocate who understands the intricate and subtle factors that might persuade a court to exercise its discretionary review and who possesses the power to communicate them succinctly and cogently appears to be as important here as is the assistance of counsel at trial or on a first appeal." *Mitchell* v. *Warden*, supra, Op. p. 4.

Having concluded that the assistance of counsel was just as important to a defendant on application for leave to appeal as it was on the first appeal, the Court went on to cite *Burns* v. *Ohio*, 360 U.S. 252, for the proposition that, consistent with the doctrine of equal protection of the laws, a state may not foreclose access to the second phase of an appellate procedure where it has afforded an indigent access to the first phase, solely due to indigency.

In that case, this Honorable Court struck down the requirement for a filing fee which denied indigent litigants access to the second stage of appellate review, solely because of indigency. The Sixth Circuit held the *Burns* case dispositive of the issue of appointment of counsel at the second stage of review on the theory that denial of counsel at that stage due to indigency is equivalent to denial of effective access to the courts, and that it is no different than denying a defendant access to the Courts by requiring a filing fee before he may proceed to the second stage of appellate review. The Court concludes by stating, "The temple of criminal justice does not have three stories for the affluent and only two for the indigent." *Mitchell* v. *Warden*, supra, Op. p. 7.

II.

A HOLDING THAT INDIGENTS ARE ENTITLED TO THE ASSISTANCE OF COUNSEL AT EVERY STAGE OF APPELLATE REVIEW WOULD NOT CREATE AN INTOLERABLE BURDEN UPON THE STATES.

The final question dealt with by the Court in *Mitchell* was the practical problem of whether institutional limitations compel a different result. The Sixth Circuit quoted from Justice Burger's concurring opinion in *Argersinger*, in which he stated that,

"the holding of the Court today may well add large burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burden placed on it." 407 U.S. at 44.

The Sixth Circuit of Appeals then concluded that, compared to *Argersinger*, the workload necessary to prepare petitions for leave to appeal or petitions for certiorari in a case already briefed below would be insignificant. The Court then noted that there is now a Michigan Appellate Defender office established which has the wherewithal to file such petitions and is in fact doing so, so that the problem created in the case at bar may soon cease to be a problem for Michigan.

Today there are 16 states that enjoy statewide defender systems. In addition, Wisconsin, Michigan, Oregon, Minnesota, and Illinois have established statewide appellate defender organizations, designed exclusively to process indigent appeals. Finally, even in those remaining states that do not provide organized defender appellate services to their citizenry on a statewide basis, the great majority of urban counties provide defender systems which include appellate capability. In all, although in 1961 only 3% of the nation's counties boasted an organized defender office, today over 64% of America's population is served by defender agencies. See *"The Other Face of Justice"*, Report of the National Defender Survey, NLADA, 1973.

Secondly, the provision of counsel for discretionary appeals will actually operate to ease the burden on the courts. The Director of the Administrative Office of the U.S. Courts has reported that during the decade from 1960 to 1970 prisoner petitions increased by 635 percent. These "tissue paper" petitions are filed by inmates who are without the

assistance of counsel to screen out meritorious claims. It has been the experience of those defender agencies which handle appeals and post-conviction matters that, once the credibility of the defender is established, far fewer appeals are filed by inmates who have been informed that their claims are frivolous. (See unpublished report of NLADA Evaluation of Minnesota Defender System (1973); Report to the California Council on Criminal Justice on the Solano County Inmate Assistance Program (1972).)

III.

POLICY CONSIDERATIONS.

A. National Standards Require the Appointment of Counsel for the Indigent at Every Stage of the Appellate Process.

The National Advisory Commission on Criminal Justice Standards and Goals has recently recommended, that,

> "Public representation should be made available to eligible defendants in all criminal cases . . . The representation should continue during trial court proceedings and through the exhaustion of all avenues of relief from conviction." Standard 13.1, Task Force Report on the Courts, 1973.

Similarly, standards of the National Legal Aid and Defender Association adopted in 1965 provide that,

> "Every defender system should provide representation . . . at every stage in the proceeding including appeal . . . to remedy error or injustice." Handbook of Standards for Legal Aid and Defender Offices, NLADA, 1965.

Finally, the American Bar Association *Standards Relating to Providing Defense Services* call for the provision of counsel,

"at every stage of the proceedings, including sentencing, appeal, and post-conviction review." Standard 5.2, Duration of Representation, ABA Project on Minimum Standards of Criminal Justice (Approved Draft, 1968).

B. Appointment of Counsel at Every Stage of the Appellate Process Is Required in the Federal System.

These nationally-approved standards all agree that, under our American system of justice, whatever avenues of relief are deemed necessary for the protection of the rich person should be made available to the poor person as well.

The federal system frequently reflects the most modern thinking in the criminal law area and its statutes may well serve as models for the states (e.g., the Federal Bail Reform Act of 1966 has been followed in a number of states). The Criminal Justice Act of 1964, as amended in 1970, provides in pertinent part,

> "If a person for whom counsel is appointed under this section appeals to an appellate court or petitions for a writ of certiorari, he may do so without pre-payment of fees and costs or security therefor and without pre-payment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28." (18 U.S.C. Sec. 3006A (6)).

It further provides,

> "A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court through appeal, including ancillary matters." (18 U.S.C. 3006A(c)).

As Justice Douglas noted in his concurrence in *Doherty* v. *United States*, 404 U.S. 28 (1971),

> "Rule 44 and the Criminal Justice Act each establish a federal policy of providing every indigent federal accused with appointed counsel at every stage in his defense from arraignment through direct review by this Court, including petitioning for certiorari."

The proposition is urged that defendants in state courts should not be entitled to an inferior brand of justice.

C. A Reversal of the Decision Below Would Contract the Scope of Representation Presently Being Provided at the State Level.

Although the existence of State Appellate Defender programs can alleviate the difficulties in providing counsel for subsequent appeals, these very programs have in some cases been directed not to proceed to file subsequent appeals on behalf of their clients. The granting of certiorari in the case at bar has added impetus to this movement. For example, in a letter to the State Appellate Defender of Wisconsin concerning the case of *LaVerne Day* v. *State of Wisconsin*, which was filed in the U.S. Supreme Court, File No. 73-6279, the Wisconsin Supreme Court has advised the State Appellate Defender that if certiorari is granted, he may not continue as counsel for the defense. Moreover, the Wisconsin Court advised that no further petitions for certiorari to the U.S. Supreme Court may be filed by that office unless specifically authorized by the Wisconsin Supreme Court.

Thus, we have come full circle back to the situation in *Douglas* v. *California*, supra. The procedure complained about in that case was an attempt by the California reviewing courts to determine prior to appointment of counsel which cases were meritorious. That procedure was struck

down in *Douglas*, and ought not to be spawned here. The decision of the Fourth Circuit in *Ross* v. *Moffit* should be upheld. To yield to the interpretation desired by appellant would result in the cutback of funds to state appellate defender agencies already existing, and a reduction in that precious commodity, equal justice for the poor.

Respectfully submitted,

NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION
By MARSHALL J. HARTMAN
By NANCY E. GOLDBERG
By JAMES F. FLUG

March 22, 1974

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-786

FRED R. ROSS and
STATE OF NORTH CAROLINA,

Petitioners,

v.

CLAUDE FRANKLIN MOFFITT,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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CLAUDE FRANKLIN MOFFITT,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether the due process and equal protection clauses of the Fourteenth Amendment require the State of North Carolina to furnish assistance of counsel to indigent defendants to petition the Supreme Court of North Carolina for a writ of certiorari to review a

decision of the North Carolina Court of Appeals, and to petition the United States Supreme Court for a writ of certiorari to review a decision of the North Carolina Supreme Court.

2. Whether the possibility that North Carolina's arbitrary denial of counsel to indigent defendants after the first appeal violates the equal protection clause of the Fourteenth Amendment requires an evidentiary hearing in the district court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV §1.

"* * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

North Carolina G.S. §7A-31.

(c) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court after determination of the cause by the Court of Appeals when in the opinion of the Supreme Court

(1) The subject matter of the appeal has significant public interest or

(2) The cause involves legal principles of major significance to the jurisprudence of the State, or

(3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

North Carolina G. S. §7A-451

(a) An indigent person is entitled to services of counsel in the following actions and proceedings:

(1) Any felony case * * * *
(3) A post-conviction proceeding under Chapter 15 of the General Statutes.

* * * *

(b) In each of the actions and proceedings enumerated in subsection (a) of this section, entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical state of the action or proceeding, including, if applicable:

* * * *

(6) Direct review of any judgment or decree, including, review by the United States Supreme Court of final judgments or decrees rendered by the highest court of North Carolina in which decision may be had.

STATEMENT OF THE CASE

I.

FOURTH CIRCUIT COURT OF APPEALS No. 72-2480 (Mecklenburg County Conviction).

In 1970 after a plea of not guilty, respondent Moffitt was convicted of forgery and uttering a forged instrument in the Mecklenburg County (North Carolina) Superior Court. On appeal the conviction was affirmed by the North Carolina Court of Appeals. *North Carolina v. Moffitt*, 9 N.C. App. 694, 177 S.E.2d 324 (1970). At trial and on appeal Moffitt was represented by court-appointed counsel. His lawyer informed Moffitt by letter that he had approached the Superior Court about getting appointed to take Moffitt's case to the North Carolina

Supreme Court but had been informed that no such right to counsel existed.

> I also approached the Superior Court about their appointing me to appeal your case from the North Carolina Court of Appeals to the Supreme Court of North Carolina. The Court stated that they did not have to furnish you with an appeal to the Supreme Court, all that is required under Federal decisions being that they furnish you with only one appeal.[1]

In December of 1970 Moffitt unsuccessfully sought relief under state post-conviction procedures, wherein he alleged several grounds for relief, but failed to raise the issue of denial of his right to counsel to seek review of his conviction in the North Carolina Supreme Court. That issue was first raised in the United States District Court for the Western District of North Carolina by application for federal habeas corpus on February 26, 1971. Habeas Corpus relief was denied and Moffitt appealed. By stipulation of counsel, the appeal was dismissed in the Fourth Circuit to allow Moffitt to exhaust state remedies as to the issue of right to counsel in the North Carolina Supreme Court.

After so exhausting his state remedies Moffitt again sought federal habeas corpus relief in the United States District Court for the Western District of North Carolina. The application was denied by order on November 29, 1972, (A. p. 9) and Moffitt appealed to the United States Court of Appeals for the Fourth Circuit which found that failure to provide Moffitt with counsel to seek review in the North Carolina Supreme Court constituted a denial of due process and equal protection under the Fourteenth

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[1] See p. 36a, Appendix to Moffitt's brief filed in the Fourth Circuit Court of Appeals.

Amendment. *Moffitt v. Ross*, 483 F.2d 650 (4th Cir. 1973).[2]

II.

FOURTH CIRCUIT COURT OF APPEALS No. 72-1720 (Guilford County Conviction).

In 1970, after a plea of not guilty, Moffitt was convicted of forgery and uttering a forged instrument in the Guilford County (North Carolina) Superior Court. The conviction was affirmed on appeal to the North Carolina Court of Appeals, *North Carolina v. Moffitt*, 11 N.C. App. 337, 181 S.E.2d 184 (1971). Moffitt's attorney from the office of the Greensboro, North Carolina, public defender's office (who represented Moffitt at trial and on appeal) then petitioned by way of certiorari for review of his conviction in the North Carolina Supreme Court. Certiorari was denied. *North Carolina v. Moffitt*, 279 N.C. 396, 183 S.E.2d 247 (1971). The Public Defender, however, did not petition for writ of certiorari in this Court.

On April 11, 1972, Moffitt filed a petition for federal habeas corpus relief on the ground that he was denied assistance of counsel to seek review in the "next highest court" from the North Carolina Supreme Court.[3] Relief was denied by the United States District Court for the Middle District of North Carolina. (A. p. 7). On appeal the Fourth Circuit found that failure to provide Moffitt with counsel to seek review by way of certiorari in the United States Supreme Court constituted a denial of due

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[2]The opinion appears at pp. 12-24 of the printed petition for writ of certiorari filed in this case on November 15, 1973.

[3]See p. 7a, Appendix to Moffitt's brief filed in the Fourth Circuit Court of Appeals.

process and equal protection under the Fourteenth Amendment. *Moffitt v. Ross*, 483 F.2d 650 (4th Cir. 1973).[4]

SUMMARY OF ARGUMENT

Moffit, as an indigent criminal defendant, was denied due process and equal protection of the laws, as construed under the Fourteenth Amendment, when he was denied assistance of counsel in the "Mecklenburg County" case to seek review of his conviction in the North Carolina Supreme Court after his conviction had been affirmed on appeal to the intermediate appellate court, the North Carolina Court of Appeals. Moffitt likewise was denied due process and equal protection of the laws when he was denied assistance of counsel in the "Guilford County" case to seek review of his conviction in the United States Supreme Court after his conviction had been affirmed by the North Carolina Court of Appeals and certiorari denied by the North Carolina Supreme Court.

In *Douglas v. California*, 372 U.S. 353 (1963), this Court found that due process and equal protection require appointment of counsel for indigents on the first appeal. The equities which require appointment of counsel under the Fourteenth Amendment on first appeals likewise require appointment of counsel (or continuation of the services of counsel) to seek review in the State's highest appellate court in a three-tier court system, and also to seek review in this Court from an adverse decision by the highest state court.

The burden placed on the state is small as counsel is already appointed, under *Douglas*, through the first

[4] See note 2, *supra*.

appeal. He is familiar with the case and, unlike the average indigent defendant, capable of presenting the case for review in the appropriate form and in literate fashion. The obvious boon to the court system in having understandable petitions for certiorari, rather than *pro se* petitions, clearly outweighs this slight additional burden on the state. Indigents, unlike defendants of means, may otherwise not have full and fair review in our criminal appellate system.

In the alternative, if the Court determines that there exists no right to assistance of counsel beyond the first appeal, then the case should be remanded for evidentiary hearing in the district court to determine if the practice of providing counsel to assist some indigents on appeals beyond the first appeal (as in the Guilford County case) and not assigning counsel in others (as in the Mecklenburg County case) violates the equal protection clause of the Fourteenth Amendment. Although the equal protection clause does not demand rigid equality among all persons, it does require that those similarly situated be treated equally.

ARGUMENT

I.

THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT REQUIRE THE STATE OF NORTH CAROLINA TO FURNISH ASSISTANCE OF COUNSEL TO INDIGENT DEFENDANTS TO PETITION THE SUPREME COURT OF NORTH CAROLINA FOR A WRIT OF CERTIORARI TO REVIEW A DECISION OF THE NORTH CAROLINA COURT OF APPEALS, AND TO PETITION THE UNITED STATES SUPREME COURT FOR A WRIT OF CERTIORARI TO REVIEW A DECISION OF THE NORTH CAROLINA SUPREME COURT

A sentiment like in kind, though different in degree, is at the root of the tendency of precedent to extend along the lines of logical development. Cardozo, THE NATURE OF THE JUDICIAL PROCESS 34 (1968 Yale Ed.)

Douglas v. California, 372 U.S. 353 (1963), established that due process and equal protection of the laws require that indigent defendants in state criminal prosecutions be afforded assistance of counsel through the first appeal. In the instant case, the questions in issue are those specifically reserved in *Douglas*—whether North Carolina must afford assistance of counsel for an indigent criminal defendant seeking discretionary review by the North Carolina Supreme Court after the North Carolina Court of Appeals sustained his conviction, and whether North Carolina must afford assistance of counsel for an indigent criminal defendant seeking review in this Court after denial of appellate review by the North Carolina Supreme Court. 372 U.S. at 356.

The so-called "three-tier" court system operative in North Carolina[5] resembles in many respects the federal model, and the California system in effect under *Douglas*. 372 U.S. at 354. The Superior Court functions as the criminal trial court for the purposes of appellate review in both felony cases and misdemeanor cases. A criminal defendant sentenced to death or life imprisonment has an appeal of right to the highest state court—the North Carolina Supreme Court. All other appeals from the Superior Court must be taken to the intermediate appellate court—the North Carolina Court of Appeals. N.C. Gen. Stat. §7A-27.[6] From a decision of the North Carolina Court of Appeals sustaining a conviction, a defendant has an appeal of right to the North Carolina Supreme Court when a "substantial question" arising under the Constitution of the United States or of the Constitution of North Carolina is involved, or where there is a dissent by a judge in the North Carolina Court of Appeals. N.C. Gen. Stat. §7A-30.[7] All other cases

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[5] At least twenty-four states now employ an intermediate appellate court system. In 1968 nineteen states had such a system. AMERICAN JUDICATURE SOCIETY, INTERMEDIATE APPELLATE COURTS 3 (Report No. 20, 1968). Counsel is informed by the American Judicature Society that from 1968 to 1973 five additional states adopted the intermediate appellate court system.

[6] §7A-27. *Appeals of right from the courts of the trial division.*—(a) From any judgment of a superior court which includes a sentence of death or imprisonment for life, appeal lies of right directly to the Supreme Court. (b) From any final judgment of a superior court, other than one described in subsection (a) of this section * * * * appeal lies of right to the Court of Appeals.

[7] §7A-30. *Appeals of right from certain decisions of the Courts of Appeals.*—Except as provided in §7A-28 [post-conviction appeals], from any decision of the Court of Appeals rendered in a case (1) Which directly involves a substantial question arising under the Constitution of the United States or of this State, or (2) In which there is a dissent. * * * *.

decided in the North Carolina Court of Appeals are subject to discretionary review in the North Carolina Supreme Court. N.C. Gen. Stat. 7A-31.[8]

A great majority of criminal defendants proceeding through the North Carolina appellate system take their first appeal to the North Carolina Court of Appeals. Under the prevailing decisions of this Court assistance of counsel to an indigent criminal defendant, such as respondent, is constitutionally requisite through such an appeal. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, supra; and *Argersinger v. Hamlin*, 407 U.S. 25 (1972). If counsel is not appointed beyond the first appeal the indigent criminal defendant must carry on alone to the highest court and, if need be, to this Court. This Court, of course, will appoint an attorney to represent indigent criminal defendants where review is granted. *Doherty v. United States*, 404 U.S. 28, 32 (1971) opinion of Mr. Justice Douglas, (concurring).

This Court in *Douglas* recognized that the due process and equal protection standards of the Fourteenth Amendment do not cease to be applicable after exhaustion of the first appeal. 372 U.S. at 356. See *Burns v. Ohio*, 360 U.S. 252, 257 (1959). The federal practice requires appointment of counsel under the Criminal Justice Act, 18 U.S.C. §3006 A, for indigent federal defendants who desire to seek discretionary review in this Court. *Doherty v. United States*, 404 U.S. 28 (1971) Even though *Doherty* was based on interpretation

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[8] §7A-31. Discretionary review by the Supreme Court.–(a) In any cause in which appeal has been taken to the Court of Appeals * * * [exceptions listed] the Supreme Court may in its discretion * * * certify the cause for review by the Supreme Court * * * *.

of statute, the federal practice has been the traditional harbinger of this Court's notions regarding appointment of counsel in state proceedings. Thus the Sixth Amendment's guarantee of right to counsel in federal trials, *Johnson v. Zerbst*, 304 U.S. 458 (1938), found its way into the Fourteenth Amendment and was made applicable to the states. *Gideon v. Wainwright*, 372 U.S. 339, (1963). The federal practice clearly recognizes the value of appointed counsel for indigents seeking discretionary review by this Court. There is no reason to conclude that state criminal defendants are any more capable of running the gauntlet alone or that their claims are less meritorious than their federal counterparts.

"For there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.' " *Douglas* supra at 355 citing *Griffin v. Illinois*, 351 U.S. 12 (1956). But no appellate review may be afforded to an indigent where the discretion of the court beyond the first appeal is not invoked. In such cases the same handicap condemned in *Douglas* now looms before the indigent seeking to invoke such discretion without counsel—the reviewing court must still make a determination of merit in proceedings where the defendant is without counsel. See *Douglas, supra*, at 356. "In all cases the duty of the state is to provide the indigent as adequate and effective an appellate review as that given to an appellant with funds. . ." *Draper v. Washington*, 372 U.S. 487, 496 (1963).

As noted by the court below, the defendant's most meaningful review of a criminal trial may lie beyond the first appeal in North Carolina. *Moffitt v. Ross*, 483 F.2d 650, 653 (4th Cir. 1973). The North Carolina Supreme Court is the final arbiter on the interpretation of state common law. The North Carolina Court of Appeals follows the interpretation given the common law by the

higher court, just as the various circuit courts follow this Court in matters of "federal common law" and federal statutory law. Thus, in *North Carolina v. Dix*, 282 N.C. 490, 193 S.E.2d 897 (1973), the North Carolina Supreme Court substantially modified the existing common law relating to the elements of the crime of kidnapping and reversed the defendant's conviction of the crime which had been upheld under the former standard by the North Carolina Court of Appeals. *North Carolina v. Dix*, 14 N.C. App. 328, 188 S.E.2d 737 (1972). It cannot be said with any degree of frankness that an indigent defendant under the circumstances would have fared so well alone. (In *Dix* there was a dissent in the North Carolina Court of Appeals, so an appeal of right to the North Carolina Supreme Court was guaranteed. N.C. Gen. Stat. 7A-30.[9] However, had Dix been an indigent, under *Douglas* there was no requirement that counsel be appointed in the North Carolina Supreme Court.)

Seeking discretionary review also involves what one observer has described as a "highly specialized aspect of appellate work."

> Certiorari practice constitutes a highly specialized aspect of appellate work. The factors which the Supreme Court deems important in connection with deciding whether to grant certiorari are certainly not within the normal knowledge and experience of an indigent appellant, unassisted by counsel. Boskey, *The Right To Counsel In Appellate Proceedings*, 45 Minn. L. Rev. 783, 797 (1961).

Seeking discretionary review in the North Carolina Supreme Court after proceeding through the North Carolina Court of Appeals involves a similar level of

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[9] See note 7, *supra*.

expertise. The standard for accepting review is set out by statute. N.C. Gen. Stat. §7A-31(c):

> (1) The subject matter of the appeal has significant public interest, or
> (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
> (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

If counsel is not afforded to assist him, an indigent defendant seeking discretionary review in the North Carolina Supreme Court must attempt to invoke the court's discretion under those standards. He can turn nowhere in the record or briefs to tell him how his case falls into one of the above criteria (with the possible exception of number 3). See *Anders v. California*, 386 U.S. 738, 745 (1967).

This Court can draw on its own experience with respect to *pro se* petitions for certiorari. The complexities of certiorari practice combined with this Court's ever increasing work load give the *pro se* petitioner little chance of success. This Court must either expend an unnecessary amount of time and energy reviewing such petitions or not give the indigent's petition full consideration. Our judicial system is not designed to provide full justice to one who is unable to clearly present his cause–in any court. A petition for writ of certiorari in this Court, or in the North Carolina Supreme Court, concisely setting forth the grounds sought for review, prepared by one with the proper expertise and familiarity with the case, could more quickly be passed upon with substantial assurance that the petitioner's cause had been adequately considered than one which is inartfully prepared by one not versed in the proper terms of art,

applicable rules of law, and, in many cases, one not versed in the rudiments of the English language. *Cf. Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). Counsel may even discourage the indigent from proceeding beyond the first appeal where there is no merit, or where another course would be more productive. See also *Anders v. California*, 386 U.S. 738 (1967).

Contrary to the argument made by North Carolina in the instant case, the burden exacted upon the state for continued appointment of counsel beyond the first appeal is small compared to the benefit gained by the defendant and the courts. The attorney in most cases acted as trial counsel and appellate counsel. It is the special skill of the attorney, not his time, that plays the dominant role after trial and the first appeal. The facts are settled for purposes of review and the reviewable issues are limited to those raised on the first appeal. Deciding which issues to bring forward and how to present those issues now becomes the only task. It is that legal skill that is possessed by counsel, and lacking in the ordinary indigent, that makes the present practice so discriminatory. The exercise of this skill, on the other hand, removes the burden of reviewing the indigent's case without benefit of counsel's arguments on behalf of the indigent, a burden heretofore shouldered by this Court and other appellate courts where indigents are not guaranteed representation by counsel. Counsel must be appointed in such cases so that this Court's constitutional duty of providing due process for every defendant who seeks relief regardless of the size of his pocket book may be fulfilled. We may now have reached the time where the higher appellate courts cannot afford to review any such case without counsel first being appointed.

As *Gideon* and *Douglas* attest, financial burden has never been an adequate excuse for failure to provide due

process or equal protection to indigent defendants. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, (1972). The impact of *Gideon - Douglas - Argersinger* on the legal profession has not brought the profession to its knees. The burden imposed by appointment of counsel beyond the first appeal in comparison to these present constitutional requirements appears trifling.

Nor will such a decision by the Court involve a novel practice. Even in North Carolina it is common practice for attorneys to represent indigent defendants beyond the first appeal. As was noted by the court below:

> [D]espite the State's claim that it is not required to provide counsel for permissive appellate procedures, it does so with great frequency. This fact was established by the Assistant Director of North Carolina's Administrative Office of the Courts. It was admitted by counsel for North Carolina during oral argument of these cases. In the Guilford County case, Moffitt, himself, was provided with legal assistance by North Carolina as he sought certiorari in the North Carolina Supreme Court. *Moffitt v. Ross*, 483 F.2d 650, 652 (1973).

The State of North Carolina cannot, therefore, hold up as burdensome a practice which it has instituted voluntarily, although not always with consistency. The State of Tennessee likewise adopted statutory language that provides counsel for indigents proceeding beyond the first appeal. Tenn. Stat. § §40-2018, 40-2020, 40-2021. *Hutchins v. Tennessee*, ____ Tenn.____ ,____ S.W.2d____, 14 Crim. L. Rep. 2396 (1974). "As our legal resources grow, there is a correlative growth in our ability to implement basic notions of fairness. Few of the concepts of due process entertained today were born full blown. They grew." *Moffitt v. Ross*, 483 F.2d 650, 655 (4th Cir. 1973).

Appointing counsel to assist indigents past the first appeal will not require the appointment of new counsel, but merely the continuation of counsel already appointed—one who is familiar with the case and who is, with the expenditure of a small amount of time, capable of fulfilling a function for which indigents are ill-suited and for which our court system is ill-designed. Such counsel most likely represented the defendant at trial and on first appeal. It appears to be the commission of a grievous waste not to direct the counsel who is already familiar with the case and has expended considerable time on the issues, to expend a very small amount of time setting down those issues in a form reviewable by this Court or the North Carolina Supreme Court, and to be available for oral argument in appropriate cases. "[T]he adversary system functions best and most fairly only when all parties are represented by competent counsel." *Argersinger v. Hamlin*, 407 U.S. 25, 65 (1972) opinion of Mr. Justice Powell (concurring).

If it is invidious discrimination against indigents to refuse assistance of counsel on the first appeal, then certainly the discrimination is no less invidious on seeking discretionary review in a higher state court or in this Court. That proposition is fully supported by this Court's decision in *Douglas v. California*, supra at 356. Although the notion has been entertained that *Douglas* stands for the proposition that due process and equal protection standards cease to be applicable after the first appeal, see *United States ex rel Pennington v. Pate*, 409 F.2d 757 (7th Cir. 1969) cert. denied 396 U.S. 1042 (1970); *Peters v. Cox*, 341 F.2d 575 (10th Cir.), cert. denied 382 U.S. 863 (1969); the notion has not withstood the "test of time." *Hutchins v. Tennessee*, _____ Tenn. _____, _____, _____ S.W.2d _____, _____, 14 Crim. L. Rep. 2396 (1974).

II.

THE POSSIBILITY THAT NORTH CAROLINA'S ARBITRARY DENIAL OF COUNSEL TO INDIGENT DEFENDANTS AFTER THE FIRST APPEAL VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES AN EVIDENTIARY HEARING IN THE DISTRICT COURT.

The court below noted that there was evidence before the court tending to show that assistance of counsel is afforded to a great many indigents beyond the first appeal in North Carolina, and not afforded to others.

> [I]t is relevant to note that, despite the State's claim that it is not required to provide counsel for permissive appellate procedures, it does so with great frequency. This fact was established by the Assistant Director of North Carolina's Administrative Office of the Courts. It was admitted by counsel for North Carolina during oral argument of these cases. In the Guilford County case, Moffitt, himself, was provided with legal assistance by North Carolina as he sought certiorari in the North Carolina Supreme Court. Counsel for North Carolina could suggest no reason why legal assistance was provided Moffitt in seeking certiorari in the North Carolina Supreme Court in the one case, but not in the other. Inquiry was made of the Assistant Attorney General as to the existence of any guidelines to be followed by state judges in deciding whether or not assigned counsel should be provided to assist indigents in seeking permissive review. He responded that he knew of none.
>
> This record provides an insufficient basis for a finding or a conclusion that North Carolina's Administration of her statute works a denial of equal protection of the laws to some indigent

appellants. It may not be amiss, however, to note that such a problem may be lurking in this case, for, if judges of courts whose judgments are sought to be reviewed are deciding whether or not to assign counsel to prepare and file an application for permissive review, and there are no standards or guidelines to govern their determination, it may well be that some indigents are denied the assistance of counsel in situations entirely comparable to those in which other indigents are furnished the assistance of counsel. *Moffitt v. Ross*, 483 F.2d 650, 652 (4th Cir. 1973).

The appropriate North Carolina statute would seem to support the requirement that appointment of counsel in all stages of the appellate process is required, including the filing of a petition for writ of certiorari in this Court. N. C. Gen. Stat. 7A-451 (See p. 2, *supra*). Apparently, because no evidentiary hearing was held in either the Guilford County case or the Mecklenburg County case, the Fourth Circuit was reluctant for purposes of the decision to find sufficient facts in the record to support a finding that the North Carolina practice was constitutionally impermissible.

However, Moffitt urges that if this Court finds that there is no constitutional right to counsel beyond the first appeal under Argument I, *supra*, then the Court should require the district courts to confront the issue of the constitutionality of the North Carolina practice by remanding the case with instructions for an evidentiary hearing on the issue. *Townsend v. Sain*, 372 U.S. 293, 313 (1963); 28 U.S.C. §2254(d). It is elementary that under the Fourteenth Amendment those persons similarly situated must be similarly treated. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); See also, *Baxtrom v. Herold*, 383 U.S. 107, 114-115 (1966).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed. In the alternative, the cases should be remanded with instructions that an evidentiary hearing be granted in the district courts.

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ROSS ET AL. *v.* MOFFITT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 73–786. Argued April 22, 1974—Decided June 17, 1974

Respondent, an indigent, while represented by court-appointed counsel, was convicted of forgery in state court in two separate cases, and his convictions were affirmed on his appeals of right by the North Carolina Court of Appeals. In one case he was denied appointment of counsel for discretionary review by the North Carolina Supreme Court, and in the other case, after that court had denied certiorari, was denied appointment of counsel to prepare a petition for certiorari to this Court. Subsequently, Federal District Courts denied habeas corpus relief, but the United States Court of Appeals reversed, holding that respondent was entitled to appointment of counsel both on his petition for review by the State Supreme Court and on his petition for certiorari in this Court. *Held:*

1. The Due Process Clause of the Fourteenth Amendment does not require North Carolina to provide respondent with counsel on his discretionary appeal to the State Supreme Court. Pp. 8–10.

(a) As contrasted with the trial stage of a criminal proceeding, a defendant appealing a conviction needs an attorney, not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt, the difference being significant since, while a State may not dispense with the trial stage without the defendant's consent, it need not provide any appeal at all. Pp. 8–9.

(b) The fact that an appeal has been provided does not automatically mean that the State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way, but unfairness results only if the State singles out indigents and

Syllabus

denies them meaningful access to the appellate system because of their poverty. Pp. 9–10.

2. Nor does the Equal Protection Clause of the Fourteenth Amendment require North Carolina to provide free counsel for indigent defendants seeking discretionary appeals to the State Supreme Court. Pp. 10–15.

(a) A defendant in respondent's circumstances is not denied meaningful access to the State Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court, since at that stage, under North Carolina's multi-tiered appellate system, he will have, at the very least, a transcript or other record of the trial proceedings, a brief in the Court of Appeals setting forth his claims of error, and frequently an opinion by that court disposing of his case, materials which, when supplemented by any *pro se* submission that might be made, would provide the Supreme Court with an adequate basis for its decision to grant or deny review under its standards of whether the case has "significant public interest," involves "legal principles of major significance," or likely conflicts with a previous Supreme Court decision. Pp. 13–14.

(b) Both an indigent defendant's opportunity to have counsel prepare an initial brief in the Court of Appeals and the nature of the Supreme Court's discretionary review make the relative handicap that such a defendant may have in comparison to a wealthy defendant, who has counsel at every stage of the proceeding, far less than the handicap borne by an indigent defendant denied counsel on his initial appeal of right, *Douglas* v. *California*, 372 U. S. 353. Pp. 14–15.

(c) That a particular service might benefit an indigent defendant does not mean that the service is constitutionally required, the duty of the State not being to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant, as was done here, an adequate opportunity to present his claims fairly in the context of the State's appellate process. P. 15.

3. Similarly, the Fourteenth Amendment does not require North Carolina to provide counsel for a convicted indigent defendant seeking to file a petition for certiorari in this Court, under circumstances where the State will have provided counsel for his only appeal as of right, and the brief prepared by such counsel

Syllabus

together with one and perhaps two state appellate opinions will be available to this Court in order to decide whether to grant certiorari. Pp. 15–16.

(a) Since the right to seek discretionary review in this Court is conferred by federal statutes and not by any State, the argument that the State having once created a right of appeal must give all persons an equal opportunity to enjoy the right, is by its terms inapplicable. *Griffin* v. *Illinois*, 351 U. S. 12, and *Douglas* v. *California*, *supra*, distinguished. Pp. 15–16.

(b) To suggest that a State is responsible for providing counsel to an indigent defendant petitioning this Court simply because it initiated the prosecution leading to the judgment sought to be reviewed is unsupported by either reason or authority. P. 16.

483 F. 2d 650, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 73-786

Fred R. Ross and North Carolina, Petitioners, v. Claude Franklin Moffit. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June 17, 1974]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We are asked in this case to decide whether *Douglas* v. *California*, 372 U. S. 353 (1963), which requires appointment of counsel for indigent state defendants on their first appeal as of right, should be extended to require counsel for discretionary state appeals and for applications for review in this Court. The Court of Appeals for the Fourth Circuit held that such appointment was required by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[1]

I

The case now before us has resulted from consolidation of two separate cases, North Carolina criminal prosecutions brought in the respective circuit courts for the counties of Mecklenburg and Guilford. In both cases respondent pleaded not guilty to charges of forgery and uttering a forged instrument, and because of his indigency was represented at trial by court-appointed counsel. He then took separate appeals to the North Carolina Court of Appeals, where he was again repre-

[1] *Moffitt* v. *Ross*, 483 F. 2d 650 (1973).

sented by court-appointed counsel, and his convictions were affirmed.[2] At this point the procedural histories of the two cases diverge.

Following affirmance of his Mecklenburg County conviction, respondent sought to invoke the discretionary review procedures of the North Carolina Supreme Court. His court-appointed counsel approached the Mecklenburg County Superior Court about possible appointment to represent respondent on this appeal, but counsel was informed that the State was not required to furnish counsel for that petition. Respondent sought collateral relief in both the state and federal courts, first raising his right to counsel contention in a habeas corpus petition filed in the United States District Court for the Western District of North Carolina in February 1971. Relief was denied at that time, and respondent's appeal to the Court of Appeals for the Fourth Circuit was dismissed by stipulation in order to allow respondent to first exhaust state remedies on this issue. After exhausting state remedies, he reapplied for habeas relief, which was again denied. Respondent appealed that denial to the Court of Appeals for the Fourth Circuit.

Following his conviction on the Guilford County charges, respondent also sought discretionary review in the North Carolina Supreme Court. On this appeal, however, respondent was not denied counsel but rather was represented by the public defender who had been appointed for the trial and respondent's first appeal. The North Carolina Supreme Court denied certiorari.[3] Respondent then unsuccessfully petitioned the Superior Court for Guilford County for court-appointed counsel to

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[2] *State* v. *Moffitt*, 9 N. C. App. 694, 177 S. E. 2d 284 (1970) (Mecklenburg); *State* v. *Moffitt*, 11 N. C. App. 337, 181 S. E. 2d 184 (1971) (Guilford).

[3] *State* v. *Moffitt*, 279 N. C. 396, 183 S. E. 2d 247 (1971).

prepare a writ of certiorari to this Court, and also sought post-conviction relief throughout the state courts. After these motions were denied, respondent again sought federal habeas relief, this time in the United States District Court for the Middle District of North Carolina. That court denied relief, and respondent took an appeal to the Court of Appeals for the Fourth Circuit.

The Court of Appeals reversed the two District Court judgments, holding that respondent was entitled to the assistance of counsel at state expense both on his petition for review in the North Carolina Supreme Court and on his petition for certiorari in this Court. Reviewing the procedures of the North Carolina appellate system and the possible benefits that counsel would provide for indigents seeking review in that system, the court stated:

> "As long as the state provides such procedures and allows other convicted felons to seek access to the higher court with the help of retained counsel, there is a marked absence of fairness in denying an indigent the assistance of counsel as he seeks access to the same court." [4]

This principle was held equally applicable to petitions for certiorari in this Court. For, said the Court of Appeals, "[t]he same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals." [5]

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[4] 483 F. 2d, at 654.

[5] 483 F. 2d, at 655. The court then decided to remand the case to the District Court to "appraise the substantiality of the federal claim." The court noted that it had no opportunity to examine the papers filed in the State Supreme Court and said that "[i]n the circumstances of this case . . . , where the only remedy available to the District Court would be the prisoner's release on a writ of habeas corpus," it was appropriate for the District Court to determine whether respondent's claim was "patently frivolous." 483 F. 2d, at 655.

We granted certiorari, — U. S. —, to consider the Court of Appeals' decision in light of *Douglas* v. *California*, *supra*, and apparently conflicting decisions of the Courts of Appeals for the Seventh and Tenth Circuits.[6] For the reasons hereafter stated we reverse the Court of Appeals.

II

This Court, in the past 20 years, has given extensive consideration to the rights of indigent persons on appeal. In *Griffin* v. *Illinois*, 351 U. S. 12 (1956), the first of the pertinent cases, the Court had before it an Illinois rule allowing a convicted criminal defendant to present claims of trial error to the Supreme Court of Illinois only if he procured a transcript of the testimony adduced at his trial.[7] No exception was made for the indigent defendant, and thus one who was unable to pay the cost of obtaining such a transcript was precluded from obtaining appellate review of asserted trial error. Mr. Justice Frankfurter, who cast the deciding vote, said in his concurring opinion:

> ". . . Illinois has decreed that only defendants who can afford to pay for the stenographic minutes of a trial may have trial errors reviewed on appeal by the Illinois Supreme Court." 351 U. S., at 22.

The Court in *Griffin* held that this discrimination violated the Fourteenth Amendment.

Succeeding cases invalidated similar financial barriers to the appellate process, at the same time reaffirming the traditional principle that a State is not obliged to provide any appeal at all for criminal defendants. *McKane* v. *Durston*, 153 U. S. 684 (1894). The cases encompassed

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[6] See *Pennington* v. *Pate*, 409 F. 2d 757 (CA7); *Peters* v. *Cox*, 341 F. 2d 575 (CA10).

[7] See 351 U. S., at 13 n. 2.

a variety of circumstances but all had a common theme. For example, *Lane* v. *Brown*, 372 U. S. 477 (1963), involved an Indiana provision declaring that only a public defender could obtain a free transcript of a hearing on a *coram nobis* application. If the public defender declined to request one, the indigent prisoner seeking to appeal had no recourse. In *Draper* v. *Washington*, 372 U. S. 487 (1963), the State permitted an indigent to obtain a free transcript of the trial at which he was convicted only if he satisfied the trial judge that his contentions on appeal would not be frivolous. The appealing defendant was in effect bound by the trial court's conclusions in seeking to review the determination of frivolousness, since no transcript or its equivalent was made available to him. In *Smith* v. *Bennett*, 365 U. S. 708 (1961), Iowa had required a filing fee in order to process a state habeas corpus application by a convicted defendant, and in *Burns* v. *Ohio*, 360 U. S. 252 (1959), the State of Ohio required a $20 filing fee in order to move the Supreme Court of Ohio for leave to appeal from a judgment of the Ohio Court of Appeals affirming a criminal conviction. Each of these state-imposed financial barriers to the adjudication of a criminal defendant's appeal was held to violate the Fourteenth Amendment.

These decisions discussed above stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons. In *Douglas* v. *California*, 372 U. S. 353 (1963), however, a case decided the same day as *Lane* and *Draper*, *supra*, the Court departed somewhat from the limited doctrine of the transcript and fee cases and undertook an examination of whether an indigent's access to the appellate system was adequate. The Court

in *Douglas* concluded that a State does not fulfill its responsibility towards indigent defendants merely by waiving its own requirements that a convicted defendant procure a transcript or pay a fee in order to appeal, and held that the State must go further and provide counsel for the indigent on his first appeal as of right. It is this decision we are asked to extend today.

Petitioners in *Douglas*, each of whom had been convicted by a jury on 13 felony counts, took appeals as of right to the California District Court of Appeal. No filing fee was exacted of them, no transcript was required in order to present their arguments to the Court of Appeals, and the appellate process was therefore open to them. Petitioners, however, claimed that they not only had the right to make use of the appellate process, but that they were entitled to court-appointed and state-compensated counsel because they were indigent. The California appellate court parsed the trial record on its own initiative, following the then existing rule in California, and concluded that "no good whatever could be served by appointment of counsel." 372 U. S., at 355. It therefore denied petitioners' request for the appointment of counsel.

This Court held unconstitutional California's requirement that counsel on appeal would be appointed for an indigent only if the appellate court determined that such appointment would be helpful to the defendant or to the court itself. The Court noted that under this system an indigent's case was initially reviewed on the merits without the benefit of any organization or argument by counsel. By contrast, persons of greater means were not faced with the preliminary "*ex parte* examination of the record," 372 U. S., at 356, but had their arguments presented to the Court in fully briefed form. The Court

noted, however, that its decision extended only to initial appeals as of right, and went on to say:

> "We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeal had sustained his conviction . . . or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by appeal as of right or by petition for a writ of certiorari which lies within the Court's discretion. But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination.' *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489; *Griffin* v. *Illinois*, *supra*, p. 18. Absolute equality is not required; lines can be and are drawn and we often sustain them." 372 U. S. 356–357.

The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment.[8] Neither clause by itself

[8] The Court of Appeals in this case, for example, examined both possible rationales, stating:

"If the holding [of *Douglas*] be grounded on the equal protection clause, inequality in the circumstances of these cases is as obvious as it was in the circumstances of *Douglas*. If the holding in *Douglas* were grounded on the due process clause, and Mr. Justice Harlan in dissent thought the discourse should have been in those terms, due process encompasses elements of equality. There simply cannot be due process of the law to a litigant deprived of all professional assistance when other litigants, similarly situated, are able to obtain profes-

provides an entirely satisfactory basis for the result reached, each depending on a different inquiry which emphasizes different factors. "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. We will address these issues separately in the succeeding sections.

III

Recognition of the due process rationale in *Douglas* is found both in the Court's opinion and in the dissenting opinion of Mr. Justice Harlan. The Court in *Douglas* stated that "[w]hen an individual is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure." 372 U. S., at 357. Mr. Justice Harlan thought that the due process issue in *Douglas* was the only one worthy of extended consideration, remarking: "The real question in this case, I submit, and the only one that permits of satisfactory analysis, is whether or not the state rule, as applied in this case, is consistent with the requirements of fair procedure guaranteed by the Due Process Clause." 372 U. S., at 363.

We do not believe that the Due Process Clause requires North Carolina to provide respondent with counsel on his discretionary appeal to the State Supreme Court. At the trial stage of a criminal proceeding, the right of an indigent defendant to counsel at his trial is funda-

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sional assistance and to be benefited by it. The same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals." 483 F. 2d, at 655.

mental and binding upon the States by virtue of the Sixth and Fourteenth Amendments. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). But there are significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the State employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant, argues rulings of the court, and makes direct arguments to the court or jury seeking to persuade them of the defendant's guilt. Under these circumstances ". . . reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon* v. *Wainwright*, 372 U. S., at 344.

By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. *McKane* v. *Durston*, *supra*. The fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the

way. *Douglas* v. *California*, *supra*. Unfairness results only if indigents are singled out by the State and denied meaningful access to that system because of their poverty. That question is more profitably considered under an equal protection analysis.

IV

Language invoking equal protection notions is prominent both in *Douglas* and in other cases treating the rights of indigents on appeal. The Court in *Douglas*, for example, stated:

> "[W]here the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." (Emphasis in original.) 372 U. S., at 357.

The Court in *Burns* v. *Ohio*, *supra*, stated the issue in the following terms:

> "Once the state chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." 360 U. S., at 257.

Despite the tendency of all rights "to declare themselves absolute to their logical extreme," [9] there are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of this Court. The Fourteenth Amendment "does not require absolute equality or precisely equal advantages," *San Antonio Independent School District* v. *Rodriquez*, 411 U. S. 1, 24 (1973), nor does it require the State to "equalize economic conditions." *Griffin* v. *Illinois*, *supra*, at 23 (Frankfurter, J., concurring). It does require that the state appellate sys-

[9] *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908).

tem be "free of unreasoned distinctions," *Rinaldi* v. *Yaeger*, 384 U. S. 305, 310 (1966), and that indigents have an adequate opportunity to present their claims fairly within the adversarial system. *Griffin* v. *California*, *supra*; *Draper* v. *Washington*, *supra*. The State cannot adopt procedures which leave an indigent defendant "entirely cut off from any appeal at all," by virtue of his indigency, *Lane* v. *Brown*, *supra*, at 481, or extend to such indigent defendants merely a "meaningless ritual" while others in better economic circumstances have a "meaningful appeal." *Douglas* v. *California*, *supra*, at 358. The question is not one of absolutes, but one of degrees. In this case we do not believe that the Equal Protection Clause, when interpreted in the context of these cases, requires North Carolina to provide free counsel for indigent defendants seeking to take discretionary appeals to the North Carolina Supreme Court, or to file petitions for certiorari in this Court.

A. The North Carolina appellate system, as are the appellate systems of almost half the States,[10] is multitiered, providing for both an intermediate Court of Appeals and a Supreme Court. The Court of Appeals was created effective January 1, 1967, and, like other state courts of appeals, was intended to absorb a substantial share of the case load previously burdening the Supreme Court. In criminal cases, an appeal as of right lies directly to the Supreme Court in all cases which involve a sentence of death or life imprisonment, while an appeal of right in all other criminal cases lies to the Court of Appeals. N. C. Gen. Stat. § 7A–27. A second appeal of right lies to the Supreme Court in any criminal case "(1) [w]hich directly involves a substantial question arising under the Constitution of the United States or of this State, or (2) [i]n which there is a dissent. . . ." N. C.

[10] See Brief for Respondent, p. 9 n. 5.

Rev. Stat. § 7A–30. All other decisions of the Court of Appeals on direct review of criminal cases may be further reviewed in the Supreme Court on a discretionary basis.

The statute governing discretionary appeals to the Supreme Court is N. C. Rev. Stat. § 7A–31. This statute provides, in relevant part, that "[i]n any cause in which appeal has been taken to the Court of Appeals . . . the Supreme Court may in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals." The statute further provides that "[i]f the cause is certified for transfer to the Supreme Court after its determination by the Court of Appeals, the Supreme Court reviews the decision of the Court of Appeals." The choice of cases to be reviewed is not left entirely within the discretion of the Supreme Court but is regulated by statutory standards. Subsection (c) of this provision states:

> "In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court after determination of the cause by the Court of Appeals wher in the opinion of the Supreme Court (1) The subject matter of the appeal has significant public interest, or (2) The cause involves legal principles of major significance to the jurisprudence of the State, or (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court."

Appointment of counsel for indigents in North Carolina is governed by N. C. Rev. Stat. § 7A–450 *et seq.* These provisions, although perhaps on their face broad enough to cover appointments such as those respondent sought here,[11] have generally been construed to limit the right to

[11] For example, subsection (b)(6) of § 7A–451, effective at the time of respondent's appeals, provides for counsel on "[d]irect

appointed counsel in criminal cases to direct appeals taken as of right. Thus North Carolina has followed the mandate of *Douglas* v. *California, supra,* and authorized appointment of counsel for a convicted defendant appealing to the intermediate court of appeals, but has not gone beyond *Douglas* to provide for appointment of counsel for a defendant who seeks either discretionary review in the Supreme Court of North Carolina or a writ of certiorari here.

B. The facts show that respondent, in connection with his Mecklenburg County conviction, received the benefit of counsel in examining the record of his trial and in preparing an appellate brief on his behalf for the state Court of Appeals. Thus, prior to his seeking discretionary review in the State Supreme Court, his claims "had once been presented by a lawyer and passed upon by an appellate court." *Douglas* v. *California, supra,* 372 U. S., at 356. We do not believe that it can be said, therefore, that a defendant in respondent's circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court. At that stage he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make *pro se,* would appear to provide the Supreme Court of North Carolina with an

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review of any judgment or decree, including review by the United States Supreme Court of final judgments rendered by the highest court of North Carolina in which decision may be had." But this provision apparently has not been construed to allow counsel for permissive appellate procedures. See *Moffitt* v. *Ross,* 483 F. 2d 650, 652 (1973).

adequate basis on which to base its decision to grant or deny review.

We are fortified in this conclusion by our understanding of the function served by discretionary review in the North Carolina Supreme Court. The critical issue in that court, as we perceive it, is not whether there has been "a correct adjudication of guilt" in every individual case, see *Griffin* v. *Illinois*, *supra*, 351 U. S., at 18, but rather whether "the subject matter of the appeal has significant public interest," whether "the cause involves legal principles of major significance to the jurisprudence of the state," or whether the decision below is in probable conflict with a decision of the Supreme Court. The Supreme Court may deny certiorari even though it believes that the decision of the Court of Appeals was incorrect, see *Peasley* v. *Virginia Iron Coal Coke Co.*, 282 N. C. 585, 194 S. E. 2d 133 (1973), since a decision which appears incorrect may nevertheless fail to satisfy any of the criteria discussed above. Once a defendant's claims of error are organised and presented in a lawyer-like fashion to the Court of Appeals, the justices of the Supreme Court of North Carolina who make the decision to grant or deny discretionary review should be able to ascertain whether his case satisfies the standards established by the legislature for such review.

This is not to say, of course, that a skilled lawyer, particularly one trained in the somewhat arcane art of preparing petitions for discretionary review, would not prove helpful to any litigant able to employ him. An indigent defendant seeking review in the Supreme Court of North Carolina is therefore somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding. But both the opportunity to have counsel prepare an initial brief in the Court of Appeals

and the nature of discretionary review in the Supreme Court of North Carolina make this relative handicap far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in *Douglas*. And the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. We think respondent was given that opportunity under the existing North Carolina system.

V

Much of the discussion in the preceding section is equally relevant to the question of whether a State must provide counsel for a defendant seeking review of his conviction in this Court. North Carolina will have provided counsel for a convicted defendant's only appeal as of right, and the brief prepared by that counsel together with one and perhaps two North Carolina appellate opinions will be available to this Court in order that it may decide whether or not to grant certiorari. This Court's review, much like that of the Supreme Court of North Carolina, is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.

There is also a significant difference between the source of the right to seek discretionary review in the Supreme Court of North Carolina and the source of the right to seek discretionary review in this Court. The former is conferred by the statutes of the State of North Carolina, but the latter is granted by statutes enacted by Congress.

Thus the argument relied upon in the *Griffin* and *Douglas* cases, that the State having once created a right of appeal must give all persons an equal opportunity to enjoy the right, is by its terms inapplicable. The right to seek certiorari in this Court is not granted by any State, and exists by virtue of federal statute with or without the consent of the State whose judgment is sought to be reviewed.

The suggestion that a State is responsible for providing counsel to one petitioning this Court simply because it initiated the prosecution which led to the judgment sought to be reviewed is unsupported by either reason or authority. It would be quite as logical under the rationale of *Douglas* and *Griffin*, and indeed perhaps more so, to require that the Federal Government or this Court furnish and compensate counsel for petitioners who seek certiorari here to review state judgments of conviction. Yet this Court has followed a consistent policy of denying applications for appointment of counsel by persons seeking to file jurisdictional statements or petitions for certiorari in this Court. See, *e. g.*, *Drum* v. *California*, 373 U. S. 947 (1963); *Mooney* v. *New York*, 373 U. S. 947 (1963); *Oppenheimer* v. *California*, 374 U. S. 819 (1963). In the light of these authorities, it would be odd, indeed, to read the Fourteenth Amendment to impose such a requirement on the States, and we decline to do so.

VI

We do not mean by this opinion to in any way discourage those States which have, as a matter of legislative choice, made counsel available to convicted defendants at all stages of judicial review. Some States which might well choose to do so as a matter of legislative policy may conceivably find that other claims for public funds within or without the criminal justice system preclude the implementation of such a policy at the present time. North

Carolina, for example, while it does not provide counsel to indigent defendants seeking discretionary review on appeal, does provide counsel for indigent prisoners in several situations where such appointments are not required by any constitutional decision of this Court.[12] Our reading of the Fourteenth Amendment leaves these choices to the State, and respondent was denied no right secured by the Federal Constitution when North Carolina refused to provide counsel to aid him in obtaining discretionary appellate review.

The judgment of the Court of Appeals' holding to the contrary is

Reversed.

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[12] Section 7A–451 (a) of the N. C. General Statutes provides:

"(a) An indigent person is entitled to services of counsel in the following actions and proceedings:

"(1) Any felony case, and any misdemeanor case for which the authorized punishment exceeds six months imprisonment or a five hundred dollars ($500.00) fine;

"(2) A hearing on a petition for a writ of habeas corpus under chapter 17 of the General Statutes;

"(3) A post-conviction proceeding under chapter 15 of the General Statutes;

"(4) A hearing for revocation of probation, if counsel was provided at trial or if confinement of more than six months is possible as a result of the hearing;

"(5) A hearing in which extradition to another state is sought;

"(6) A proceeding for judicial hospitalization under chapter 122, article 11 (Mentally Ill Criminals), of the General Statutes;

"(7) A civil arrest and bail proceeding under chapter 1, article 34, of the General Statutes; and

"(8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible."

SUPREME COURT OF THE UNITED STATES

No. 73-786

Fred R. Ross and North Carolina, Petitioners, v. Claude Franklin Moffit. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June 17, 1974]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

I would affirm the judgment below because I am in agreement with the opinion of Chief Judge Haynsworth for a unanimous panel in the Court of Appeals. *Moffit* v. *Ross*, 483 F. 2d 650.

In *Douglas* v. *California*, 372 U. S. 353, we considered the necessity for appointed counsel on the first appeal as of right, the only issue before us. We did not deal with the appointment of counsel for later levels of discretionary review, either to the higher state courts or to this Court, but we noted that "there can be no equal justice where the kind of appeal a man enjoys 'depends on the amount of money he has.'" *Id.*, at 355.

Judge Haynsworth could find "no logical basis for differentiation between appeals of right and permissive review procedures in the context of the Constitution and the right to counsel." 483 F. 2d, at 653. More familiar with the functioning of the North Carolina criminal justice system than are we, he concluded that "in the context of constitutional questions arising in criminal prosecutions, permissive review in the state's highest court may be predictably the most meaningful review the conviction will receive." *Ibid.* The North Carolina Court of Appeals, for example, will be constrained in diverging from

an earlier opinion of the State Supreme Court, even if subsequent developments have rendered the earlier Supreme Court decision suspect. "[T]he state's highest court remains the ultimate arbiter of the rights of its citizens." *Ibid.*

Judge Haynsworth also correctly observed that the indigent defendant, proceeding without counsel, is at a substantial disadvantage relative to wealthy defendants represented by counsel when he is forced to fend for himself in seeking discretionary review from the State Supreme Court or from this Court. It may well not be enough to allege error in the courts below in layman's terms; a more sophisticated approach may be demanded: *

"An indigent defendant is as much in need of the

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*An indigent defendant proceeding without the assistance of counsel would be attempting to satisfy one of three statutory standards for review when seeking certiorari from the North Carolina Supreme Court:

"(1) The subject matter of the appeal has significant public interest, or

"(2) The cause involves legal principles of major significance to the jurisprudence of the State, or

"(3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court."

N. C. Gen. Stat. § 7A–31 (c). It seems likely that only the third would have been explored in a brief on the merits before the Court of Appeals, and the indigent defendant would draw little assistance from that brief in attempting to satisfy either of the first two standards.

Rule 19 of this Court provide some guidelines for the exercise of our certiorari jurisdiction, including decisions by a state court on federal questions not previously decided by this Court; but it may not be enough simply to assert that there was error in the decision of the court below. Cf. *Magnum Co.* v. *Coty*, 262 U. S. 159, 163. Moreover, this Court is greatly aided by briefs prepared with accuracy, brevity, and clarity in its determination of whether certiorari should be granted. See *Farness, Withy & Co.* v. *Yang-Tsze Insurance Assn.*, 242 U. S. 430, 434.

assistance of a lawyer in preparing and filing a petition for certiorari as he is in the handling of an appeal as of right. In many appeals, an articulate defendant could file an effective brief by telling his story in simple language without legalisms, but the technical requirement for applications for writs of certiorari are hazards which one untrained in the law could hardly be expected to negotiate.

"'Certiorari proceedings constitute a highly specialized aspect of appellate work. The factors which [a court] deems important in connection with deciding whether to grant certiorari are certainly not within the normal knowledge of an indigent appellant. Boskey, The Right to Counsel in Appellate Proceedings, 45 Minn. L. Rev. 783, 797 (1961) (footnote omitted).'" 483 F. 2d, at 653.

Furthermore, the lawyer who handled the first appeal in a case would be familiar with the facts and legal issues involved in the case. It would be a relatively easy matter for the attorney to apply his expertise in filing a petition for discretionary review to a higher court, or to advise his client that such a petition would have no chance of succeeding.

Douglas v. *California* was grounded on concepts of fairness and equality. The right to discretionary review is a substantial one, and one where a lawyer can be of significant assistance to an indigent defendant. It was correctly perceived below that the "same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals." *Id.*, at 655.